

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CR. NO. 15-4268 JB

ANGEL DeLEON, et al.,

Defendants.

VOLUME 2

Transcript of Motion Proceedings before  
The Honorable James O. Browning, United States  
District Judge, Las Cruces, Dona Ana County,  
New Mexico, commencing on December 18, 2018.

For the Government: Ms. Maria Armijo; Mr. Randy  
Castellano

For the Defendants: Mr. Brock Benjamin; Ms. Cori  
Harbour-Valdez; Mr. Pat Burke; Mr. Robert Cooper;  
Mr. Scott Davidson; Ms. Amy Jacks; Ms. Lauren  
Noriega; Mr. Marc Lowry; Ms. Carey Bhalla, Mr. Bill  
Maynard; Mr. Donovan Roberts; Ms. Lisa Torracco

For the Defendants Via Telephone: Mr. James Castle

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1 THE COURT: All right. Why don't we go  
2 ahead -- we can't get our phone system to work, so  
3 we'll have to work on it during the day to get Mr.  
4 Castle in. But let's go ahead and get started.

5 Good morning. I appreciate everybody being  
6 here and ready to go on time.

7 Ms. Armijo, did you want to respond to  
8 Mr. Lowry's arguments as to why that exhibit -- I  
9 believe it was JJ -- is relevant?

10 MS. ARMIJO: Yes. I just need two of the  
11 exhibits, two of the location histories.

12 THE COURT: Do I have those?

13 THE CLERK: Yes, they're in the folder for  
14 this case.

15 MS. ARMIJO: Yes, Your Honor. Yesterday  
16 Mr. Lowry was mentioning, in reference to Joe  
17 Martinez' statement -- and more specifically Mr.  
18 Calbert's statement -- he indicated that -- I believe  
19 the quote -- and I don't know that Mr. Lowry put it  
20 in evidence, but what he showed yesterday was that  
21 Mr. Calbert indicated that this transfer had occurred  
22 when he had gone up to the North, after the stabbing  
23 of Paul Silva, for which he was charged. And he was  
24 showing you the location histories of Mr. Martinez  
25 and Mr. Urquizo.

1 And I'm showing you Exhibit No. 10, and  
2 more specifically, Exhibit No. 12, where you can see  
3 that after 2012, up until 2016, Mr. Martinez was not  
4 at the North because he was not in custody; hence, he  
5 was making the argument that's impossible because  
6 2013 is what the time period you're looking for.

7 But I would refer the Court to the  
8 indictment in 4269 -- the case 15-CR-4269, the  
9 companion case to this one, that was indicted the  
10 same day -- to Count 1 on page 8. And it has the  
11 date of the actual crime, which was in March 2011;  
12 specifically March 14, 2011.

13 So the dates that Mr. Lowry was referring  
14 to yesterday, saying that it was impossible to have  
15 this exchange, should really be looked at, instead of  
16 2013, 2011.

17 And when you look at the location histories  
18 for these two people, Joe Patrick Martinez was in the  
19 North in 2011. And in fact, he said he thought it  
20 happened sometime within four to five months after  
21 this occurred. This occurred in March. And he even  
22 indicates on there, I believe the quote -- I don't  
23 think Mr. Lowry read it -- but he said he was bad  
24 with dates, but he thought it happened after he went  
25 to the North, would be in 2011. And you can clearly

1 see that he is at the North in 2011. And so is Mr.  
2 Calbert; he's here at the North as well.

3 Oh. Mr. Lowry just provided me with the  
4 cross-examination -- it's page 46 of the  
5 transcript -- and he says, "It's right after the  
6 Silva case, what happened with Silva, and they put me  
7 in 1-B, away from everybody. And I don't know what  
8 year it was. Like I said, I'm real bad with dates."  
9 And then he even says, "it may be within that four to  
10 five months." So this clearly puts it within the  
11 time period, as Mr. Calbert indicated. And that is  
12 what I wanted to point out to the Court.

13 The rest of the argument, since that was  
14 the only thing that Mr. Lowry was kind of arguing  
15 yesterday, we will reserve to wait to respond to  
16 theirs.

17 THE COURT: All right. Thank you,  
18 Ms. Armijo.

19 All right. Mr. Lowry, do you want to argue  
20 your motion for new trial for Mr. Baca?

21 MR. LOWRY: We were going to do it on  
22 paper, Your Honor. That was the agreement.

23 THE COURT: You were going to do what?

24 MR. LOWRY: We were going to submit paper  
25 on it.

1 THE COURT: All right. And you know you  
2 owe me a stack of these exhibits?

3 MR. LOWRY: I do, and I'm working on that  
4 now, Your Honor.

5 MS. ARMIJO: And, Your Honor, do you want a  
6 copy of the indictment? I believe it should be Doc 1  
7 or 2 of this. But I --

8 THE COURT: I don't mind putting it into my  
9 folder for Mr. Baca, so I'll take it.

10 MR. LOWRY: Your Honor, just with regard to  
11 the exhibits, I may have overlooked yesterday -- we  
12 spoke about it briefly -- the three conditional phone  
13 calls that were going to be admitted, and there were  
14 Q, R, and S, they're in the brief. And I'll get  
15 those. We lodged them yesterday, and I'll get a copy  
16 for Mr. Armijo.

17 THE COURT: All right. What is it that you  
18 just had? Did you want to mark what you just put up  
19 here on the cross-examination? Or do you just want  
20 to rely on the transcript for that?

21 MS. ARMIJO: I'm sorry? For --

22 THE COURT: Well, did you want to mark  
23 something further? You put it up on the screen  
24 highlighted.

25 MS. ARMIJO: Oh, this was just what Mr.

1 Lowry was using yesterday. I don't think he moved to  
2 admit it, but I'm sure he may be referring to it, if  
3 he still uses this argument. And so it's part of --  
4 I believe we had agreed yesterday that anything in  
5 the trial could be introduced as evidence. So I'm  
6 assuming he would use this. So I don't know that he  
7 was planning on moving it in. My only point was just  
8 that the location histories do match up from the  
9 Silva case.

10 THE COURT: All right. Thank you,  
11 Ms. Armijo.

12 All right. Mr. Lowry.

13 MR. LOWRY: Thank you, Your Honor.

14 Your Honor, that's it. I mean, I don't  
15 want to belabor the point. I think the transcript  
16 speaks for itself. The United States and I pick out  
17 different anchors in terms of what's the  
18 transactional language in the transcript, and we'll  
19 leave it to the Court to decide.

20 THE COURT: All right. Mr. Castle, are you  
21 there? Mr. Castle?

22 MR. COOPER: Your Honor, if I may, I will  
23 text him and tell him that we are now up and running.

24 THE COURT: All right. Did you have any  
25 further argument, Mr. Lowry, on your motion?

1 MR. LOWRY: No, Your Honor.

2 THE COURT: All right. Ms. Armijo, do you  
3 have further argument?

4 MS. ARMIJO: No, Your Honor.

5 THE COURT: Well, it seems to me that this  
6 is just issues for the jury to decide. It's  
7 additional evidence. But -- I'll work and look  
8 closely at Mr. Baca's motion, but I'm inclined to  
9 think it doesn't raise an issue that requires a new  
10 trial. It was just some additional information that  
11 could have been put forward, as developed as the  
12 trial went through, and then as we concluded the  
13 trial. But I'll give it a hard look, but I'm not  
14 inclined to grant the motion, at least at the moment.

15 All right. I think the next motion that we  
16 are going to take up is Billy Garcia's -- excuse me,  
17 Mr. Troup's motion, which Mr. Billy Garcia joined.  
18 There may have been others that joined it as well.  
19 So --

20 MR. BURKE: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. BENJAMIN: Your Honor, before we start,  
23 Joe Gallegos also joined.

24 THE COURT: Okay. There may be others. I  
25 know there is one formal joinder, but there may have

1     been others.

2             Are you there, Mr. Castle?

3             MR. BURKE: Your Honor, Edward Troup was  
4     released from prison, having finished his sentence on  
5     May 10, 2012. From that date until his arrest on the  
6     indictment in this case, December 3, 2015, a period  
7     of 43 months, he was a free man for almost three  
8     years of those 43 months. He did have a dirty urine,  
9     and that led -- or two -- and that led to  
10    incarceration. But for most of the period of time,  
11    for the three-and-a-half years leading up to this  
12    indictment, my client was a free man. And during  
13    that time he got married, he was steadily employed,  
14    he had reestablished relationships with his family,  
15    he was a contributing member of society. An argument  
16    can even be made that he had paid his debt to society  
17    in the large part because he lost so much good time,  
18    over six years, as a result of the Freddie Sanchez  
19    homicide in June of 2007.

20            At the time of his arrest, Edward Troup had  
21    been under the care and treatment of Dr. Valerie  
22    Carrejo. I had the privilege of meeting her. She is  
23    a very fine, wonderful and caring doctor. And she  
24    had Edward under her care. And they were going  
25    through Suboxone treatment. They hadn't quite



1 finished it, when he was arrested on December 3,  
2 stayed briefly in a county jail, and then was  
3 transported to Otero County.

4 Edward finished his removal from heroin  
5 while at Otero County, in effect, sort of cold  
6 turkey. And during the three years and two weeks  
7 that he has been incarcerated since that time at  
8 Otero County and Torrance County and the West Texas  
9 Detention Facility in Sierra Blanca, Texas, he has  
10 not received a single dirty urine or incident report  
11 for any other kind of behavior, thereby  
12 distinguishing himself from almost every one of the  
13 Government's informants in this case.

14 I mention that because Edward has become a  
15 friend. And these cold remarks about a new trial  
16 don't quite capture the relationship that my  
17 co-counsel and I have developed with our client. I  
18 would like to say that the reason that I was able to  
19 visit Edward at Otero County and Torrance County, and  
20 the West Texas Detention Facility, and the marshals  
21 holding cell downstairs is because Your Honor  
22 understood the importance of the attorney-client  
23 relationship. And you went out of your way to make  
24 sure that this case was well funded, and that we  
25 didn't have to worry about whether we would have

1 enough funding to defend this case as well as we knew  
2 how.

3 I want to make one or two other comments,  
4 and that is that, in addition to Your Honor's great  
5 respect for the process and our clients, the people  
6 that you work with, including Ms. Bevel and Ms. Bean,  
7 and the marshal's office, have treated my client with  
8 respect. And for that we thank you.

9 Your Honor, I begin the substance of my  
10 argument with the second argument about Michael  
11 Jaramillo. Angel DeLeon and Michael "Criminal"  
12 Jaramillo killed Frank "Pancho" Castillo on March 26,  
13 2001, in the Southern New Mexico Correctional  
14 Facility, P-1, green pod, cell 2204.

15 The DNA of both DeLeon and Michael  
16 "Criminal" Jaramillo identified them as the killers.  
17 Two months after Castillo was killed, a lab report  
18 confirmed the presence of DeLeon's and Jaramillo's  
19 DNA on a knotted white cord that was the instrument  
20 of death, that came from Castillo's own laundry bag.

21 State Agent Norman Rhoades issued an arrest  
22 warrant, but that was not pursued. Nothing happened  
23 in 2001 on that case. Nothing happened in 2002.

24 Then, on July 22, 2003, Lorenzo Torres told  
25 state investigators when he was, of course, trying to

1 make a deal on a parole situation, that he saw Edward  
2 Troup in the upper pod that day of the Castillo  
3 homicide. I think many of us will remember Mr.  
4 Torres at trial. I'm an advocate, so my view is  
5 probably tainted. But I think it would be very  
6 difficult for anyone to believe a single word that  
7 Torres said in this courtroom under oath. He  
8 acknowledged that he was up early on March 26, 2001,  
9 looking for heroin. The April 24 transcript reflects  
10 an answer from him, "I was looking upstairs. I was  
11 looking for heroin.

12 "Q. You were wanting to get some heroin?

13 "A. I was wanting to get some heroin."

14 It was early in the morning, 5:30 to 6:30.  
15 Torres said that he saw Angel DeLeon, but Torres said  
16 that he did not remember or see the killer,  
17 Jaramillo. And aside from his inherent lack of  
18 credibility, the fact that he didn't see the killer,  
19 Jaramillo, confirmed that he was not a reliable  
20 witness.

21 The three inmates that Torres mentioned in  
22 his scatter-brained statement, in July 2003, were  
23 DeLeon, Joe Gallegos, and Edward Troup, those three  
24 people. And from that moment on, that's who the  
25 Government stuck with: DeLeon, Gallegos, and Troup.

1 And those are the people who were indicted 14 years  
2 later, in 2015.

3 And from the time of the initial indictment  
4 in December 2015, the case against Edward Troup on  
5 Count 1 was Lorenzo Torres. With regard to that  
6 case, my co-counsel and I were aware of a plan and a  
7 procedure where we could cross-examine him. We knew  
8 that Lorenzo Torres had refused to make any  
9 statements to investigators in March, when he was  
10 being interrogated at that time. He, Torres, refused  
11 to give DNA back in March of 2001. He did not  
12 provide a DNA sample.

13 We learned that the Castillo laundry bag  
14 cord was the instrument of death. So this phony  
15 statement about seeing Edward Troup and Angel DeLeon  
16 disabling a laundry bag was shown to be the lie that  
17 it was. And Torres said that Angel DeLeon told him  
18 that Joe Gallegos strangled Castillo, when the  
19 evidence shows, and we learn later that it was  
20 Jaramillo. He was not a believable witness. But  
21 that was the Government's theory. And the three  
22 actors in the indictment on the 2001 homicide were  
23 Joe Gallegos, Angel DeLeon, and Edward Troup.

24 The Government never bothered to run down  
25 the obvious important evidence that Jaramillo's DNA

1 was on the weapon of death.

2 Even Torres' pretrial interview on March  
3 28, 2018, he didn't include Jaramillo, because the  
4 prosecution team couldn't give him any information  
5 that would cause him to suddenly remember Jaramillo.  
6 And we conducted our voir dire based on "that" case.  
7 We gave our opening statement based on "that" case.  
8 We conducted our initial cross-examinations based on  
9 "that" case.

10 I note also, Your Honor, because I believe  
11 it is important, that my co-counsel and I filed our  
12 motion to dismiss regarding the delay on October 5,  
13 2017. That's Document 1284. It's not an elaborate  
14 motion. It was straightforward. It alleged various  
15 facts on pages 2 and 3. And we were having a hearing  
16 about that motion on April 4 and 5, as we were doing  
17 the run up to trial. And I mention that in  
18 particular because we laid out our case on, and our  
19 defense, on Count 1. In that motion we were not  
20 subtle, we were not holding back. We laid out our  
21 case. And in our motion we noted that these charges  
22 are based solely on the statements of Government  
23 informants. And as a result, Edward Troup is also  
24 suffering prejudice because he is being victimized by  
25 one of the most pernicious features of modern

1 prosecutions: The Government's use of informants who  
2 are seeking benefits. The Government can provide  
3 inducements to informants if they make statements  
4 that are consistent with the theory selected by the  
5 prosecution.

6 We noted that the prejudice becomes more  
7 manifest because the prosecution plays a cat and  
8 mouse game with discovery. The Government refuses to  
9 provide Jencks statements until two weeks before  
10 trial, which was the state of play at the time of the  
11 motion. The Government has not provided Giglio and  
12 Brady materials in good faith.

13 And thus, Edward Troup suffers ongoing  
14 prejudice, the prejudice caused by the delay. It  
15 might have been ameliorated if the Government had  
16 played straight with Jencks materials, or if the  
17 Government had provided all Giglio and Brady  
18 materials early on. But that's not what the  
19 Government has done. The Supreme Court has made  
20 clear that certain delays, due to their sheer length,  
21 are presumptively prejudicial.

22 We cited Doggett v. United States, a 1992  
23 case, which said "impairment of one's defense is the  
24 most difficult form of Speedy Trial prejudice to  
25 prove, because time's erosion of exculpatory evidence

1 and testimony can rarely be shown."

2 And, Your Honor, we went on to say that the  
3 decision was a tactical one to include the 2001  
4 homicides in the indictment. And we even filed a  
5 supplement to that motion noting the additional  
6 discovery of the Burkhead declination letter, which  
7 had been held by the Government for so long, but  
8 finally, it was revealed. And that was the March 26,  
9 2015 letter, in which the United States Attorney's  
10 Office said that it would not be prosecuting the  
11 Garza and Castillo homicides because the witnesses  
12 were incredible.

13 And thus, Your Honor, the timeline on  
14 Jaramillo was that on March 26, 2001, Jaramillo  
15 strangled the life out of the Frank Castillo. On May  
16 23, 2001, DNA lab results showed indications of  
17 Jaramillo on the cord that he used to snuff the life  
18 out of Castillo.

19 On August 8, 2007, Leonard Lujan was  
20 interviewed, and stated that he directed other  
21 inmates, including Michael "Criminal" Jaramillo to  
22 kill Frank Castillo, and thereafter, Leonard Lujan  
23 repeated that several times.

24 On April 10, 2018, counsel for Edward Troup  
25 conducted voir dire based on the understanding that

1 Jaramillo would not be a witness in the case.

2 On April 12, 2018, counsel for Edward Troup  
3 gave the defense's opening statement based on the  
4 understanding that Jaramillo would not be a witness  
5 in the case.

6 On April 18, 2018 -- well into the trial --  
7 Jaramillo is provided with a Kastigar letter. On  
8 April 19, 2018, for the first time, an FBI 302 was  
9 produced.

10 Your Honor, in the interests of justice, we  
11 should have a new trial on Count 1.

12 Those defending Count 2, they understood  
13 that the Government's approach was to put Eugene  
14 Martinez, the killer, on the stand, and they had time  
15 to get ready. And they prepared, and they worked  
16 hard, and it took a long time. And I, for one, will  
17 never forget cross-examination of my colleague, Bob  
18 Cooper, of Eugene Martinez on April 25 and April 26,  
19 in which he brought out from the witness stand that  
20 Eugene Martinez had been lying all along about  
21 witnessing the deaths of his father and brother. And  
22 they were able to bring out the many times that  
23 Eugene Martinez feigned incompetency, and they were  
24 able to successfully persuade the jury that this  
25 witness could not be trusted. And on Count 2, the



1 verdicts were "not guilty." And that's because our  
2 colleagues defending Count 2 had enough time to go  
3 after the killer, the actual killer.

4 And for all of those reasons, we say the  
5 interests of justice suggest that a new trial should  
6 be granted on Count 1.

7 THE COURT: Let me talk to you about  
8 Jaramillo. I noticed -- and correct me if I'm  
9 wrong -- that when I read through your briefing on  
10 that, you did not cite the opinion that I wrote on --  
11 you remember there was this issue about Jaramillo not  
12 appearing on the witness list --

13 MR. BURKE: Right.

14 THE COURT: -- and whether with this being  
15 a death penalty eligible case, and learned counsel  
16 being appointed, whether that had to be -- he had to  
17 be on that list a certain number of days before  
18 trial. I did issue that opinion, right?

19 MR. BURKE: Well --

20 THE COURT: I mean, I've got a lot of  
21 opinions in draft that need to go out on this case.  
22 But I thought that one had gone out. Am I wrong?

23 MR. BURKE: I can't remember, because  
24 the -- I know that the Government --

25 THE COURT: The reason I say that is

1 because I spent a lot of time -- I went back and  
2 worked real hard on the chronology of Jaramillo as  
3 the -- where he was in the Government's case, and on  
4 witness lists and not on witness lists, going into  
5 the trial. Because my memory is I found there was a  
6 violation of that statute, and that statute did  
7 apply. But that in the end, the remedy that the  
8 defendant sought was not appropriate.

9 MR. BURKE: It's exactly what you found,  
10 Judge. And the Government attached the transcript --

11 THE COURT: Well, I noticed they attached a  
12 transcript. But don't I have an opinion out there on  
13 this? I need to find out if one got issued, because  
14 I spent a lot of time with it. It's possible that  
15 it's in some file and I haven't issued it. Do you  
16 know?

17 MR. BURKE: I don't believe it did get  
18 issued. But I don't trust myself on having 100%  
19 grasp of the file in this case. I remember that  
20 Scott Davidson took the laboring oar on the  
21 submission by the defense. And I know that it was  
22 hotly disputed. And Your Honor took a considerable  
23 amount of time. And I do remember you hunting down  
24 all of the law, and then eventually finding that the  
25 three-day requirement for a death penalty case did

1 apply, and that this was a death penalty case,  
2 because the findings were included in the indictment  
3 that made it a death eligible case.

4 And in working on the motion for new trial,  
5 I tried to look at every filing that was relevant.  
6 And I didn't see the Court's opinion. I'm going to  
7 talk about one other of your opinions during trial  
8 shortly, but I didn't see that.

9 THE COURT: But we both still have to  
10 grapple with the fact that on the day of venire, on  
11 the Monday, we're still, I believe, now two -- almost  
12 two full days ahead of opening statements -- Mr. Beck  
13 was sitting over there reading the witnesses for  
14 trial. And do you remember we had the juror that  
15 didn't understand why we were reading the list of  
16 witnesses, and so it was reread. And Mr. Jaramillo's  
17 name was then -- I think Mr. Acee fed it to him so he  
18 would get it in there.

19 MR. BURKE: I believe that's true. And I  
20 can assure you that my co-counsel and I were huddling  
21 when we heard the name. But I will just tell you my  
22 feeling. My feeling was that that will never work;  
23 that he will never be allowed to testify in this case  
24 because the Government had not complied with any of  
25 the rules relating to producing Jencks statements.

1 And the Court knew how hard we were all preparing.  
2 And I never really -- to be perfectly candid, I never  
3 really believed that you would let him in.

4 THE COURT: Well, one of the remedies that  
5 I had was pushing him down, way down into the case.  
6 So I wouldn't let the Government just drag him out  
7 here first day of trial, but shoved him way down in  
8 the case, and put him down as far as I could into the  
9 case, to allow as much to be done as possible.

10 The thing is: What do you do with a  
11 witness that won't talk, and then finally talks?

12 MR. BURKE: Well, I have an answer to that.

13 This case was turned over to the feds in  
14 2003. You give him a Grand Jury subpoena. And you  
15 say, Come on in here. And if you're interested in  
16 pursuing the truth in 2003, when the feds took over  
17 the case, you give him 6001 immunity, and you say:  
18 You are talking. And if he doesn't talk then, you  
19 find him in contempt. And you then have a series of  
20 six months in contempt, like they did with Susan  
21 McDougal during the Clinton Whitewater investigation.

22 Oh, there are ways to do this if you're a  
23 responsible investigator. That absolutely could have  
24 been done. You certainly don't wait for a trial  
25 subpoena, when people have been working for years to

1 get ready for trial, and pretend that that's a fair  
2 way to proceed.

3 The Government had remedies to force  
4 Mr. Jaramillo to come forward. And if they wanted to  
5 give the killer immunity, they could have done it in  
6 2003, and probably should have.

7 THE COURT: All right. Mr. Burke, anything  
8 further on your motion?

9 MR. BURKE: Oh, yes.

10 THE COURT: All right.

11 MR. BURKE: I'm going to turn to severance.  
12 When I think about severance, Your Honor, the first  
13 thing I think about was the hearing on February 7,  
14 2017. Everyone at that point, particularly the  
15 Court, was struggling with what to do with this  
16 unwieldy indictment. And just before lunch that day  
17 you instructed the prosecutors and the defense  
18 lawyers during the recess to figure out how the case  
19 could best be divided into three trials. It's the  
20 transcript on pages 141 and 142, February 7, 2017.  
21 Your Honor: "All right, well, let's take our lunch  
22 break. Here's the assignments for lunch,  
23 Mr. Castellano, Mr. Cooper. Give me three  
24 single-digit defendant trials."

25 We, the defense, then convened and yelled

1 at each other for about an hour. And Mr. Cooper,  
2 like herding cats, got enough of a consensus to come  
3 back in, and he said "This is what we could do." He  
4 came back in. And among the things he said,  
5 Mr. Cooper, "And then the last trial would be eight  
6 defendants in the 2001 and 2007 murders at Southern,  
7 Counts 1, 2, and 3. So those are the proposals that  
8 we've worked on in the last hour. And again, Judge,  
9 we don't have a consensus." And that was an  
10 understatement. Because I remember  
11 Ms. Harbour-Valdez and I saying you can't put 1 and 3  
12 together; that's not fair to Edward Troup. But  
13 that's what we came up with, and we submitted it to  
14 the Court.

15 And then it was the prosecution's turn, and  
16 Mr. Castellano said, "Given the posture," he says,  
17 "we still object regarding severance," as if we could  
18 have had a trial with that crowd. "But given the  
19 posture, we'll give you a breakdown of two trials."

20 Your Honor, I have never seen anything like  
21 that. I had never seen a prosecutor defy a judge,  
22 especially Your Honor. But that's what happened.  
23 The prosecution would not give a suggestion of three  
24 trials with single-digit defendants. And that's an  
25 illustration of what became even more apparent of the

1 "win at all costs" approach to the case.

2 And as I've said before and will say again  
3 now, about these prosecutors, they are not afraid of  
4 hard work. They are among the hardest working  
5 prosecutors I've ever seen. And if the Court had  
6 said: We're going to have three trials in 4268, they  
7 would have done three trials. And there should have  
8 been three trials, as the Court initially felt.

9 And I recognize the tremendous burden on  
10 all of us, particularly Your Honor. And I also  
11 recognize that Congress has given prosecutors this  
12 tremendous weapon, VICAR. One cannot complain or  
13 find fault with Agent Acee investigating allegations  
14 that Department of Corrections officials were being  
15 targeted for murder. But it didn't make sense ever  
16 for Counts 1 and 3 to be linked up with those more  
17 recent allegations.

18 And so I say to Your Honor, your initial  
19 instinct was right. It should have been smaller  
20 trials. And Edward Troup ended up going to trial,  
21 having to, in effect, defend against the Adrian Burns  
22 homicide, so that throughout the trial we saw  
23 pictures of his burned body. And it was dismaying,  
24 and the jury would turn away from the photographs.

25 The homicides in 2001 and 2007 being

1 linked, those at least were at the same environment.  
2 But the more recent actions, the Burns homicide, was  
3 not of the same type. It wasn't of the same time.  
4 And we asked that the trial be separated.

5 And we noted that the Court had originally  
6 said that it was going to have two juries in the  
7 first trial, and then that changed on the weekend  
8 before trial. But we had heard that the Court was  
9 considering that. We read, and we tried to stay up.  
10 And we suggested the bifurcation procedure as well.  
11 And we believe that the Court's initial instinct on  
12 having three trials was correct, and the Court's  
13 initial instinct on having a separate jury for the  
14 different sorts of allegations was correct. And we  
15 believe that the interests of justice would be served  
16 if there was a new trial based on the inadequate  
17 severance.

18 Your Honor, I now turn to jury  
19 instructions. And I will apologize again for not  
20 raising many of these issues during the trial. I was  
21 working pretty hard. Ms. Harbour-Valdez was working  
22 hard. No one was working harder than you. When I  
23 left at 6 p.m. you were here. When I would arrive at  
24 the courtroom the next day at 7:30, you were here.

25 But it's not as though we were idle at



1 night.

2 I also want to say to my client and to the  
3 Court that I really can't relate to how Edward was  
4 raised. I didn't have to worry about food being on  
5 the table, or clothing, or those sorts of things.  
6 But there was one recent event in my life wherein I  
7 can relate to Edward Troup. And that happened on  
8 April 5, when the prosecution came in to court and  
9 accused my co-counsel and I of suborning perjury.

10 And the Government was only too happy to  
11 take the false statements of Daffy Garcia to try to  
12 end Cori Harbour-Valdez' and my lives as we knew it.  
13 They were only too happy to take his false  
14 statements, to make public accusations of criminal  
15 behavior by my co-counsel and I. So on that I can  
16 relate to being the victim and the target of false  
17 statements.

18 And the person who put a stop to that was  
19 Your Honor. Because you said in so many words:  
20 Whoa, whoa, whoa, let's take a deep breath, let me  
21 understand this more. And by the time that the Court  
22 finished its inquiry, the prosecution backed off, and  
23 the prosecution acknowledged that Daffy Garcia was --  
24 and pardon me for once again saying this -- a filthy  
25 liar, who was willing to ruin lives, including the

1 legal careers of my co-counsel and I. And if anyone  
2 were to think that we've ever received an apology for  
3 that horrible event, think again.

4 But every night during trial or in the  
5 morning of trial we would get a new statement, and  
6 then lo and behold, Billy Cordova or Blue Rodriguez  
7 or Styx Archuleta had remembered something new, and  
8 lo and behold, it filled the gap in the prosecution's  
9 case. And that's because the "win at all costs"  
10 approach was still pervading how this trial was being  
11 conducted.

12 And I do criticize that approach. And I  
13 criticize it because -- and quoting, "The United  
14 States Attorney is the representative not of an  
15 ordinary party to a controversy but of a sovereignty  
16 whose obligation to govern impartially is as  
17 compelling as its obligation to govern at all. A  
18 prosecutor can prosecute with earnestness and vigor,  
19 indeed he should do so. But while he may strike hard  
20 blows, he is not at liberty to strike foul ones. It  
21 is as much his duty to refrain from improper methods  
22 as it is to use legitimate means to bring about a  
23 just one."

24 The ABA Code talks about the responsibility  
25 of a public prosecutor, that it's different from us,

1 it's different from usual advocates.

2 I note your opinion, Your Honor, in United  
3 States v. Ballou, 59 F.Supp. 3d 1038, "The United  
4 States' goal in all cases is to do justice and not to  
5 just secure a conviction." And that was in the  
6 context of a 404(b) issue.

7 And with regard to instructions in a  
8 criminal case it is the duty of the court to instruct  
9 properly on all essential questions of law, whether  
10 requested or not.

11 I remember early on, as well, in discovery,  
12 when you said both in open court and in your opinion  
13 to the prosecutors: Please put yourselves in the  
14 shoes of the defense. And that, by the way, is the  
15 law. With regard to Brady, they have to hunt it  
16 down. That is the law. But as we saw so many  
17 times -- as recently as yesterday -- this Government  
18 team is incapable -- incapable -- of putting itself  
19 in the shoes of the defense. Their "win at all  
20 costs" attitude trumps Brady, it trumps Jencks, and  
21 it trumps every other constitutional requirement.

22 And with regard to jury instructions, I  
23 know I let the Court down and I let my client down.  
24 But I did raise some issues, and I will talk about  
25 those primarily. I raised the issue of misprision.

1 And it was a perfectly legitimate instruction. But  
2 the prosecutors fought it tooth and nail, consistent  
3 with their "win at all costs" attitude. And the  
4 misprision instruction, which might have given us a  
5 little bit of balance in the instruction was not  
6 given.

7 I talk in our papers --

8 THE COURT: Refresh my memory on that,  
9 because my memory is not distinct on that. Did you  
10 submit an instruction on misprision?

11 MR. BURKE: I did.

12 THE COURT: And where would it have gone?  
13 Would it have gone in that Fifth Circuit VICAR  
14 instruction as one of the things that Mr. Troup could  
15 have committed to satisfy the -- one of the elements?

16 MR. BURKE: It would not have been a lesser  
17 included offense. It would have been a lesser  
18 similar offense.

19 THE COURT: Of the murder?

20 MR. BURKE: Yeah. And the theory that we  
21 were advancing was, particularly with regard to Count  
22 1, because the most that was ever said about Edward  
23 Troup is that he may have been on the steps, and  
24 Torres said: Don't come up here.

25 And then Jaramillo said: Well, when I

1 left, I saw Troup downstairs, and he was, you know,  
2 magically keeping everybody else in their cells.

3 And I said, what that fits is not telling  
4 people, misprision; not conceding. And I said the  
5 facts support that.

6 THE COURT: But -- maybe some of this is  
7 coming back and I'm just going to have to review  
8 it -- but how does that help you? That was -- I  
9 think my memory at the time was that the Government  
10 did not want to go to the jury on that theory, which  
11 is a lesser or, as you say, a similar but lesser  
12 theory. But they wanted to put on their shoulders  
13 the burden of going to the jury just on murder. How  
14 did it help you to --

15 MR. BURKE: We were advancing it not as a  
16 subset of VICAR, but as a standalone offense. So  
17 that as to Count 1, the jury would have had the  
18 option of finding him not guilty as to VICAR murder,  
19 but then proceeding to say on that offense he is  
20 guilty of misprision.

21 THE COURT: But you would agree with me  
22 that Blockburg (phonetic) doesn't require -- and I  
23 may have the Supreme Court case wrong -- but it  
24 didn't require the Court or the Government to go to  
25 the jury on that, and therefore --

1 MR. BURKE: It was discretionary, Your  
2 Honor.

3 THE COURT: And so it's not a theory that  
4 they wanted to advance. They didn't want to convict  
5 Mr. Troup of that offense. They only wanted to  
6 convict him on the VICAR. So --

7 MR. BURKE: I believe you had the  
8 discretion to give the misprision instruction.  
9 That's what I believe. And I believe you should have  
10 given it.

11 THE COURT: Well, it's just an unindicted  
12 free-standing felony to throw into the case. Is  
13 there any authority for me being able to just pick  
14 another crime and say: Let's go to the jury on that?

15 MR. BURKE: Your Honor, in my filing there  
16 is plenty of authority that you had. And in my  
17 filing --

18 THE COURT: But I thought those were lesser  
19 included offenses, not similarly but lesser offenses.

20 MR. BURKE: No, it wasn't just lesser  
21 included. It was not just lesser included. And I  
22 don't have that filing in front of me. But it was --

23 THE COURT: I'll go back and look at it.

24 MR. BURKE: It gave you the authority to  
25 give that instruction. And I believe the instruction

1 should have been given.

2 THE COURT: And I didn't write anything on  
3 this?

4 MR. BURKE: No.

5 THE COURT: Okay. Let me go to the heart  
6 of the jury instruction -- and I'll hear anything you  
7 want to say on the jury instructions -- but the  
8 heart, the thing that struck me as I read through  
9 yours, was this issue on the murder conviction. It  
10 seemed to me there was an internal inconsistency --  
11 and correct me if I'm wrong -- in your argument. On  
12 one side it seemed to me you were saying later in  
13 your briefing that there should have been no  
14 instruction on murder given at all; that just the  
15 inclusion of that at all was wrong, and that I should  
16 have followed the Fifth Circuit pattern instructions.  
17 And they do not include that, and therefore, I  
18 shouldn't include it at all. And in another place  
19 earlier in the briefing you say I gave the wrong  
20 murder charge. I shouldn't have looked at New Mexico  
21 law either for first degree or second degree, and I  
22 should have given some generic murder charge. Isn't  
23 there a tension between those two?

24 MR. BURKE: I believe that there was a  
25 tension in your rulings. And what I said --

1 THE COURT: That may be. But isn't there a  
2 tension in your argument?

3 MR. BURKE: No. And here is the  
4 distinction. I did not say that the New Mexico  
5 material elements of the New Mexico first degree  
6 murder statute are wrong in any instance. In fact,  
7 we conceded that first degree may fit. The argument  
8 was you can't have the murder statutes of 50  
9 different states. You had to have a general  
10 recognized murder instruction. And first degree in  
11 New Mexico fits it. And so we did not complain about  
12 New Mexico's first degree murder statute or the  
13 elements.

14 And so what we had done was we said: You  
15 cannot give second, because it's beyond the statute  
16 of limitations for second in New Mexico, which is a  
17 six-year statute. You found law that said the  
18 state's procedural rules are not necessarily adopted  
19 when we are going to bring -- and you wrote an  
20 opinion, and I put it in my papers. I argued that  
21 the statute of limitations was jurisdictional and not  
22 procedural. And you gave the second.

23 This additional argument is that New  
24 Mexico's second degree murder statute, by talking  
25 about probability, probability is a bad statute to



1 use in VICAR. And we focused on second.

2 THE COURT: You would agree with me that  
3 that was never argued at the trial, that argument?

4 MR. BURKE: Yes.

5 THE COURT: And it's taken until your  
6 reply, until today, to get there. So that one is  
7 going to be judged by plain error.

8 MR. BURKE: I agree.

9 THE COURT: What -- it seemed to me you  
10 were relying a lot on some district court cases for  
11 that. Is there anything more substantive than  
12 district court on that issue?

13 MR. BURKE: You know, I believe United  
14 States v. Frumento, the Third Circuit case in '77,  
15 which is on page 10 of the filing on December 14,  
16 where it says, "The federal statute does not punish  
17 the same conduct as that reached by state law.  
18 Rather, reference to state law is necessary only to  
19 identify the type of unlawful activity in which the  
20 defendant intended to engage," quoting U.S. v.  
21 Cerone, another Seventh Circuit case, 1971.

22 So in the reply, there are some circuit  
23 cases, Your Honor.

24 THE COURT: Has either the Supreme Court or  
25 the Tenth Circuit gone this direction?

1 MR. BURKE: I've not seen it. I mean --

2 THE COURT: Here's my thought -- and I  
3 looked at the age of those cases and the fact that  
4 they were district court cases -- one thing that it  
5 seemed to me those cases were doing -- and I've got a  
6 lot of studying to do on this, because this is being  
7 raised in replies and fairly late -- it seemed to me  
8 that we've had a vigorous debate in the sentencing  
9 area, on crimes of violence. And, of course, the  
10 Supreme Court has pulled in this generic definition.  
11 And that has been heavily criticized. I don't know  
12 if you noticed that this week the Sentencing  
13 Guideline Commission has now come out -- bless their  
14 heart, they're trying to deal with a Supreme Court  
15 that has constitutionalized this area, and makes it  
16 very difficult for anybody to do anything with the  
17 area, because once they constitutionalize it, we  
18 can't change it. But they're going to try. They're  
19 going to try to come back in with a guideline  
20 definition of crime of violence.

21 And the reason I bring that up is I'm  
22 wondering if these cases were influenced by the  
23 Supreme Court going down that path, which I think has  
24 been heavily criticized, and they've sort of drawn  
25 back a little bit. And whether that's good law to

1 say that when Congress says "state" in the VICAR  
2 statute, it doesn't incorporate the state law, but  
3 instead, you've got to go to generic. It seems to me  
4 that's adding something to the statute. It may be  
5 that that's the law.

6 MR. BURKE: May I respond?

7 THE COURT: Sure.

8 MR. BURKE: I am familiar with that Johnson  
9 line of cases on crime of violence. And it's been a  
10 mess, and the Tenth Circuit has had a heck of a time  
11 trying to sort that out. But I believe, with regard  
12 to VICAR, at least insisting that it be -- the sort  
13 of require the intent that is required in a first  
14 degree murder, intentional act. Because what  
15 happened with the New Mexico statute, it --

16 THE COURT: Tell me why. Give me -- that's  
17 a good way to put it, but tell me why from a policy  
18 standpoint, you've got Congress passing a statute and  
19 then we've got courts coming in and saying no, no,  
20 no, let's ignore the statute, let's go to a generic  
21 model penal code, or something like that. Tell me  
22 why that is a good separation of powers issue.

23 MR. BURKE: Because the Congress, in its  
24 wisdom, said that if it's a VICAR murder, you've got  
25 a life sentence. Because Congress said you get a

1 life sentence. For VICAR first degree murder that  
2 makes some sense. It does not make sense with a  
3 lesser second degree murder where language such as  
4 "probability" is being used.

5 THE COURT: But the congressional statute,  
6 the VICAR statute, doesn't say first degree murder  
7 and second degree murder. It says --

8 MR. BURKE: It says murder.

9 THE COURT: It says murder.

10 MR. BURKE: It says murder. And that's  
11 where -- I mean, at least there are some court cases  
12 and some district court cases that say, Let's not  
13 have this far ranging --

14 THE COURT: I'm not saying that's not good  
15 policy. I'm not disagreeing with you on the policy.  
16 But just tell me from a power standpoint why the  
17 courts get to say: No, a state murder means not New  
18 Mexico murder, but it means some model penal code or  
19 some restatement or some other definition. It  
20 doesn't really mean state, it means some model  
21 generic code.

22 MR. BURKE: Well, I can't do better than  
23 what -- we have given you those district court cases.  
24 And one was that Lee case. United States --

25 THE COURT: Is that from the Eastern

1 District of Virginia?

2 MR. BURKE: Exactly. Observing that this  
3 would lead to the nonsensical result of treating  
4 differently defendants who engaged in the same  
5 conduct in different states.

6 THE COURT: But why is that wrong? I mean,  
7 if, in fact, Congress is going to pull up state law,  
8 isn't that -- weren't they saying, Yeah, that's the  
9 reality of it?

10 MR. BURKE: Your Honor, that's the argument  
11 we make in defending capital cases all the time,  
12 where the death sentences all come from the Death  
13 Belt, also known as the Old South. And we say: You  
14 can't have that, and everybody goes, You got to have  
15 national law, you've got to be consistent throughout  
16 the United States. So you just made the argument we  
17 make as capital case defenders sometimes, is that it  
18 should be uniform. And so that's -- I'm not saying  
19 it's crystal clear. And to be perfectly candid, I  
20 thought the statute of limitations argument was --

21 THE COURT: Was your better argument?

22 MR. BURKE: Yeah, was a better argument.

23 THE COURT: Okay. Well, I will take a hard  
24 look at that. It's an interesting issue. And I've  
25 always thought Alito had the better argument on that

1 crime of violence issue at the Supreme Court, and to  
2 some degree Scalia was not the best on that issue.  
3 But it may be that it's been incorporated over --

4 MR. BURKE: Well, Scalia was an  
5 originalist, and he somehow knew what they were  
6 thinking. So I don't know what else to say.

7 THE COURT: At least on that issue he  
8 wasn't going back to 1702. He was at least going in  
9 our lifetime.

10 MR. BURKE: Your Honor, I was going to make  
11 some additional remarks about instructions, but I'm  
12 not going to do that, because --

13 THE COURT: Go ahead.

14 MR. BURKE: No, I really --

15 THE COURT: That one intrigued me, and it  
16 seemed to be the gut of your argument.

17 MR. BURKE: It was -- the lead argument was  
18 on 31 and 33, instructions 31 and 33. But the  
19 remaining arguments you've obviously read. And we  
20 feel strongly about them. I apologized already. I  
21 apologize again. I feel like I broke the bond  
22 between a trial lawyer and a trial judge. But I --

23 THE COURT: Well, most of the ones that are  
24 there are pattern instructions.

25 Now, Ms. Jacks got me to modify a bunch of

1 the pattern instructions in the first trial. And I  
2 normally don't do that. But I didn't think they were  
3 terribly helpful to the defendants. But I didn't  
4 have any problem if that was -- if that helped the  
5 appearance of doing justice to those four men. But  
6 these pattern ones --

7 MR. BURKE: I'm sure you saw our law in  
8 there that pattern instructions aren't to be given  
9 automatically.

10 THE COURT: Yeah. And there is one in the  
11 drug area, I just reject routinely and have to  
12 change. But it changes in favor of the Government.  
13 It doesn't change in favor of the defendants on that  
14 one.

15 MR. BURKE: That seems to be the pattern.  
16 Your Honor, I am going to wrap up here,  
17 because I know you have pored over and read  
18 everything we've submitted.

19 Your Honor, ultimately, all of these  
20 discussions really are about justice. I recognize  
21 that the law seeks finality. But Rule 33 is an  
22 unusually flexible rule. It says, "If the interests  
23 of justice so requires." I know what the interests  
24 of justice would require from my perspective. I know  
25 what the interests of justice would mean to my

1 colleagues on the prosecution side. But it doesn't  
2 matter what my view is or what the prosecution's view  
3 is. It only matters whether you think that the  
4 interests of justice requires a new trial for Edward  
5 Troup.

6 I can think of some things that don't go  
7 into deciding that. One is whether it will be more  
8 hard work. I think that it has been demonstrated  
9 that no one works harder than this Court. And I  
10 believe that the prosecution and the defense work  
11 hard. So hard work is not part of this.

12 Funding it is not part of it. Whether it's  
13 costly to do it again, that's not a factor, because  
14 that has nothing to do with justice. We are a  
15 country of laws; we believe in the rule of law. And  
16 if the law indicates that the interests of justice  
17 must be served by a new trial, then so be it.

18 I don't even think that it means that it's  
19 an acknowledgment of some sort of error. I think,  
20 just in the calm aftermath, when you look at it and  
21 you say: This could be done more fairly, the  
22 interests of justice could be served by doing this  
23 again, then I believe that gives you the discretion  
24 to give us a new trial.

25 Ms. Harbour-Valdez and I hope that we've



1 given you a basis on which you might decide, upon  
2 reflection, that Edward Troup deserves a new trial.  
3 And if you do reach that conclusion, I ask that it be  
4 without Counts 4 and 5; that it be with a true  
5 discovery cutoff date; that it be with a binding  
6 Jencks rule; and that it be in a case where Brady  
7 violations will not be tolerated at all.

8 Thank you, Your Honor.

9 THE COURT: Thank you, Mr. Burke.

10 Mr. Castellano -- let me see, there were  
11 some people that joined Mr. Burke on that. Anybody  
12 want to say anything on that issue? Mr. Cooper?

13 MR. COOPER: Your Honor, I don't believe  
14 that we have anything to add. I know that Mr. Castle  
15 has joined, and has been on the line for quite some  
16 time. But Billy Garcia joins in all of the arguments  
17 that were advanced by Team Troup. I don't think that  
18 I could articulate those arguments half as good as  
19 Mr. Burke did. And we would ask as well for a new  
20 trial on behalf of Billy Garcia.

21 THE COURT: Thank you, Mr. Cooper.

22 Mr. Benjamin.

23 MR. BENJAMIN: Your Honor, if -- I can do  
24 it now or I could do it later -- my motion for Count  
25 1 tracks on some points and plagiarizes Mr. Burke's

1 motion. But there are some issues that the Court  
2 raised that I would like to address now, or in Count  
3 1.

4 THE COURT: Do you want to go ahead and  
5 just take his motion up at the same time?

6 MR. CASTELLANO: That's fine, Your Honor.

7 THE COURT: All right. Any objection to  
8 doing that, Mr. Burke?

9 MR. BURKE: None whatsoever, Your Honor.

10 THE COURT: All right. So Mr. Benjamin, if  
11 you want to go ahead and argue Mr. Gallegos' motion,  
12 Mr. Joe Gallegos.

13 MR. BENJAMIN: And, Your Honor, as  
14 Mr. Cooper said, I can't begin to say some of the  
15 things as eloquently as Mr. Burke did.

16 But if the Court will remember specifically  
17 dealing with -- and Mr. Gallegos' motion is Document  
18 2453 -- or, excuse me, not 2453, that's the  
19 Government's response to Mr. Gallegos' document,  
20 which was 2419.

21 But there is a specific issue that has  
22 bugged me personally about the Michael Jaramillo  
23 aspect. Because if the Court will remember from when  
24 this came up during trial at the beginning of April,  
25 that it was our investigator that went out and tried

1 to talk to Mr. Jaramillo.

2 THE COURT: When did you do that? Remind  
3 me when that occurred.

4 MR. BENJAMIN: Summer of '16, Your Honor.

5 THE COURT: Summer of '16?

6 MR. BENJAMIN: Yes, Your Honor. Or  
7 essentially very early on.

8 THE COURT: So early on you went out there  
9 and tried to get him to talk?

10 MR. BENJAMIN: And that was --

11 THE COURT: My memory is he blew you off,  
12 he didn't want anything to do with you.

13 MR. BENJAMIN: He did. And that was a  
14 suggestion that was made by Troup's team, Your Honor,  
15 Ms. Valdez had an investigator that was handy, and  
16 she suggested that, and it worked to both of our  
17 benefits.

18 But the Court had a specific phrase  
19 earlier, you said: What do you do when witnesses  
20 don't want to talk to you? And that's the problem  
21 that is presented by the whole Michael Jaramillo  
22 argument.

23 Because the Government in its response on  
24 page 5 says, the second paragraph, "But things went  
25 differently. The United States learned of the

1 significance of Jaramillo's role in the offense after  
2 the trial began." And I don't want to belabor the  
3 points that Mr. Burke pointed out. But that's  
4 entirely false, Your Honor. There was DNA evidence  
5 on -- or in the file and in the disclosures about  
6 Michael Jaramillo. And so this isn't just, Oh, we  
7 were doing witness interviews, and somebody's name  
8 came up, and we decided that they didn't rank very  
9 high on our order of priority, we didn't go talk to  
10 them.

11 They have that ability. They have the  
12 ultimate ability that, as a defense attorney, I long  
13 for, which is the ability to issue unlimited number  
14 of Grand Jury subpoenas to go out and talk to  
15 individuals.

16 And so to say the fact that -- and this is  
17 from their response -- the fact that Jaramillo did  
18 not come forward with the truth until that day is  
19 understandable, it doesn't make any sense, Your  
20 Honor. Because the defense, when we go talk to  
21 somebody, when Bill went and talked to Michael  
22 Jaramillo, and he says: I don't remember anything,  
23 we, whether we like it or not, have no power to  
24 compel that. But the Government who brought this  
25 case has every bit of power to do that. After that

1 they could have indicted Michael Jaramillo if he was  
2 not talking to them. They have lots of tools at  
3 their disposal. We don't have the power to indict  
4 him for failing to talk to us, or giving us --

5 THE COURT: Isn't it a dangerous doctrine  
6 for the Court to try to fashion something that puts  
7 pressure on the Government to indict more people? I  
8 mean, that doesn't seem like a good idea. I mean, we  
9 don't want more people indicted unless they have to  
10 be indicted. So to fashion some sort of doctrine  
11 that encourages more people indicted, I don't know,  
12 I'm not sure that's getting us to justice. Do you?

13 MR. BENJAMIN: I agree wholeheartedly with  
14 the Court's impression. I apologize, I think I've  
15 been going at this the wrong way.

16 This is all going towards the argument that  
17 the Government, when it produced its witness list,  
18 omitted a star person who was going to testify.

19 They dealt with Count 1 for -- we dealt  
20 with it from December 3rd of '15 to the date of  
21 trial. And at no point in time did --

22 THE COURT: I need to track down this  
23 opinion that I'm not certain whether it was entered  
24 or it's still in one of my folders. But I thought  
25 that they were always on the may call list --

1 Jaramillo; he was just a wild card out there. He  
2 wouldn't talk to you, he wouldn't talk to the  
3 Government, so he was appearing on may calls. Is my  
4 memory off on that?

5 MS. HARBOUR-VALDEZ: Yes.

6 MR. BENJAMIN: Your Honor, I believe he  
7 was -- no, I'm being told he was not.

8 Respectfully, Your Honor, in dealing with  
9 seven counts, I had hundreds of people on a may call  
10 list that then, ultimately, the Court thankfully  
11 whittled down.

12 But the idea that this was a person who we  
13 omitted accidentally, and then all of a sudden  
14 just -- on I think it was April 9th or 10th read his  
15 name, because that's when we just came up with it, I  
16 don't think rings true, Your Honor.

17 And so the issue, I think, that comes up is  
18 what I discussed in my motion regarding Count 1,  
19 which is that Mr. Gallegos was able to successfully  
20 defend an allegation where a victim took the stand  
21 and testified. We had -- after all this time I'm  
22 drawing a complete blank standing up here. We had an  
23 individual come in and testify and take the stand  
24 that Joe Gallegos chased him down and was trying to  
25 attack him. But that was able to be successfully

1 defended because I was able to investigate those  
2 claims and deal with those claims.

3 I think that's entirely different when we  
4 get blindsided with an individual who, prior to the  
5 Jencks deadline, we don't get a statement from,  
6 because they chose not to do that. The Government  
7 should not be allowed to lay behind the law, and just  
8 surprise us with: Oh, well, he just showed up and  
9 dropped in our laps, and he hasn't been cooperative  
10 with us.

11 THE COURT: But how do you draft a doctrine  
12 that says that? I mean, how do you say a witness  
13 can't show up and us have to deal with it, all of us,  
14 them, me, you. We just deal with somebody that's  
15 come in and raises their right hand and swears to  
16 tell the truth, how do you deal with that, other than  
17 just dealing with it?

18 MR. BENJAMIN: Well, Your Honor, the Court  
19 set a deadline. And the Government complied with  
20 that deadline. The Government didn't come forward  
21 and say: You know what, in reviewing the document we  
22 filed Friday, we made a mistake. He's not on there.  
23 And the Court's remedy is exclusion of that witness.  
24 You knew that this was a witness who was vital,  
25 vital, absolutely vital to your case. You didn't put

1 him on your witness list --

2 THE COURT: I'll go back and look and see  
3 if it's in the opinion. But I thought that he was on  
4 may call list fairly late, and then, of course, he  
5 was announced as a witness in this trial to the jury  
6 before the trial began.

7 MR. BENJAMIN: Your Honor, I'm going to  
8 deal with this more on Counts 4 and 5, but the issue  
9 that comes up is a witness that is that vital to  
10 their case, that there is no statements produced on,  
11 or that they never even --

12 THE COURT: They didn't have any  
13 statements, right? There is nothing to produce.

14 MR. BENJAMIN: I don't think it rings true  
15 that they didn't go talk to Michael Jaramillo at some  
16 point in time from when we were able to talk to him  
17 from 2016 on, a person whose DNA was on the murder  
18 weapon. And the Court asks how does it do that? I  
19 think it excludes a witness. That was the purpose --

20 THE COURT: Is that just raw judicial  
21 power, or is there some doctrine that sort of backs  
22 that up?

23 MR. BENJAMIN: Your Honor, I would have to  
24 stick with raw judicial power. I think that's what  
25 the Court --



1 MS. HARBOUR-VALDEZ: Sorry, Your Honor.

2 THE COURT: That's all right.

3 MR. BENJAMIN: I'm being told Document  
4 1968, which is the Government's supplemental witness  
5 list from March 23, didn't list him either.

6 And so the -- what I'm struggling with,  
7 Your Honor, is the idea that, genuinely, we  
8 overlooked Michael Jaramillo. Can I say that for an  
9 officer who is a sideline officer, who --

10 THE COURT: Here's the way I would  
11 characterize what I was reading from the defendants  
12 was, you know, he's out there, he's kind of floating  
13 in orbit. He could be a wild card. But you've got  
14 to make strategic professional decisions. I  
15 understand that. And it didn't look like he was  
16 going to be in this case. I get that. But, you  
17 know, he's out there. Anything can happen. I mean,  
18 it doesn't seem to me that anybody criticized your  
19 decisions to say: Right now he's not on our radar,  
20 we've got enough to worry about, but also he's a  
21 person out there. I mean, you knew he was out there  
22 because you were trying to interview him. They were  
23 trying to do things with him. And he's out there.  
24 Isn't that just the reality? And you have to make a  
25 professional decision, which you did -- and it's a

1 good one -- like I've got enough bodies that I know  
2 are going to be here, I'm not going to go set a  
3 strategy and try to work with somebody that may never  
4 show up. That seems to me to be good defense work.

5 MR. BENJAMIN: Your Honor, I appreciate the  
6 praise. I disagree with the way the Court  
7 articulated. Because they knew he was out there.  
8 And their position is that they didn't do anything  
9 knowing he was out there.

10 And so discovery in criminal cases drives  
11 most of us crazy, because when we're arguing about  
12 money, any amount of money, or even just a judgment,  
13 we get told what we need; we are able to challenge  
14 things. We're left with the criminal discovery  
15 system that we have, though. And that criminal  
16 discovery system is limited. And I'm looking for the  
17 very limited benefits that I believe that that  
18 criminal discovery system provides to me. And I  
19 think that, one, it provides to me the ability to  
20 have Jencks statements provided to me two weeks prior  
21 to trial, as the Court ordered. I think it provides  
22 to me the ability to have, even if it is ultimately  
23 very last second, the ability to have a witness list  
24 that I can rely on. It's those type of things that,  
25 respectfully, the Court is right, I have to focus my

1 energies and ideas on certain things. And when, at  
2 the very last second, something else has changed, I  
3 can't do that.

4 And one of the things that I think the  
5 Court tried to do -- and from my perspective it's not  
6 something I was able to do -- is try to give us time  
7 by having Michael Jaramillo testify later in the  
8 trial.

9 Respectfully, Your Honor, Mr. Sindel and I  
10 were up till every night about 12:00 or 1:00 o'clock  
11 in the morning prepping for the next witnesses. So  
12 yes, we had three weeks or -- I don't have the number  
13 off the top of my head -- amount of time. But we did  
14 not have time to devote to creating or identifying a  
15 new theory of our defense, such that we were able to  
16 deal with a witness, even if that witness was pushed  
17 later.

18 And so I think that the Court is right, I  
19 don't want to fashion a remedy where the Government  
20 is required to indict everybody. But I think I do  
21 want to fashion a remedy where the Government is  
22 stuck with what they chose to do, and is not able to  
23 change at the last second based upon their whim and  
24 disregard, the Court's raw judicial power of a  
25 witness list that -- and also the Jencks idea.

1 Thank you, Your Honor.

2 THE COURT: Thank you, Mr. Benjamin.

3 Mr. Davidson, you wanted to say something  
4 on this issue?

5 MR. DAVIDSON: A few words, Your Honor. As  
6 you may recall, I did the briefing on this. I just  
7 wanted to point out in my --

8 THE COURT: I think you found one of the  
9 old Supreme Court cases that I relied on heavily in  
10 finding there had been a violation, correct?

11 MR. DAVIDSON: Correct, Your Honor.

12 And I just wanted to clarify for the  
13 record, as stated in my filing, Document 2139, that  
14 the none of the Government witness lists include the  
15 name and address of Michael Jaramillo. And I cited  
16 Documents 1968, 2089, and 2091.

17 I also pointed out the Government conceded  
18 that Michael Jaramillo was omitted. And that was on  
19 page 1 of their brief, Document 2138. The Government  
20 also conceded that it knew of its inadvertence as  
21 early as the first day of voir dire for the second  
22 trial -- that was at page 6 -- and it did not file a  
23 supplemental witness list at that time.

24 With respect to Your Honor's questions  
25 about a remedy, I don't think the remedy that's being

1 sought is that the Government should indict more  
2 people. It's that either this should be adjournment,  
3 which was asked for, or exclusion, which was asked  
4 for. And so that would be the remedy that would be  
5 appropriate when you have a late disclosed witness in  
6 a case like this. And neither of those remedies, as  
7 I recall, were afforded. I just wanted to clarify  
8 that.

9 THE COURT: All right. Thank you, Mr.  
10 Davidson.

11 Any other defendant want to speak on either  
12 Mr. Joe Gallegos' motion or Mr. Troup's motion before  
13 I hear from Mr. Castellano?

14 MR. COOPER: Your Honor, I've been notified  
15 by Mr. Castle that he has additional argument on this  
16 issue.

17 THE COURT: All right. Mr. Castle.

18 MR. CASTLE: Yes, good morning, Your Honor.

19 THE COURT: Mr. Castle.

20 MR. CASTLE: The issue seems to be, in  
21 analyzing this particular matter, is what is fair.  
22 And that's kind of always a hard thing for the Court  
23 to struggle with. And when we look at the parties  
24 and try to analyze what's fair, I would start with  
25 the defense. And the defense clearly was put at a

1 disadvantage in this trial with the last-minute  
2 witness. And three days -- three or four or five  
3 days really didn't cure that unfairness. Because the  
4 kind of investigation that is needed to analyze a  
5 witness who comes forward some 15-17 years later,  
6 that kind of investigation is really significant and  
7 it takes a lot of time. And it's essentially going  
8 back and unearthing years and years of information,  
9 including in a fashion that could be digested by the  
10 jury. And clearly that didn't happen.

11 We know a lawyer was unable to unearth that  
12 information and present that to the jury. So  
13 Mr. Jaramillo became somewhat of a super witness,  
14 because he was one of a few, if not the only witness,  
15 who didn't have a vigorous cross-examination against  
16 him, other than that he was an admitted murderer.

17 Then we analyze the fairness to the  
18 prosecution. They were in a much different situation  
19 than the defense. Where the defense tried to  
20 interview Mr. Jaramillo to see if he was going to  
21 even be a percipient witness in the case, and were  
22 turned down, and they'd exhausted all of their  
23 abilities to call or interview that witness, the  
24 Government did not. The Government had the Grand  
25 Jury power to put him on as a witness; not

1 necessarily to indict him but to put him on as a  
2 witness. That's an important tool that the  
3 Government is provided before they have to make  
4 decisions on indictments. They can reconvene grand  
5 juries even after indictment, as we saw in this case.  
6 They had plenty of opportunity to do so.

7 So the idea is if one party or the other  
8 has to bear the burden on this problem, which party  
9 has less, I guess, equity in their favor regarding  
10 the late endorsement of the witness? And I would  
11 argue that the Government certainly has less equity  
12 in their favor.

13 But I understand what the Court is  
14 struggling with. And it is just a raw use of  
15 judicial power to have prevented a witness who  
16 apparently had information relevant to a serious  
17 charge, is that just raw use of power? And I think  
18 the answer may very well have been yes at the time.

19 So what do we do about it? Well, there are  
20 two other avenues -- three other avenues that  
21 fairness militated in favor of. One was a  
22 substantial adjournment, as Mr. Davidson suggested.  
23 One was a mistrial, which the only downside on that  
24 is cost and finding court time. But those are not  
25 available anymore. So we're left with the third

1 alternative, which is to grant a new trial on Count  
2 1.

3 And as Mr. Burke better laid out, it does  
4 not appear to be any aspect of fairness that would be  
5 offended by granting a new trial. But in fact, the  
6 very issue of fairness would be supported by a new  
7 trial, which Mr. Jaramillo would be subject to the  
8 kind of vigorous cross-examination that the  
9 Constitution anticipates.

10 Thank you, Your Honor.

11 THE COURT: Thank you, Mr. Castle.

12 One thing I would ask you -- and this  
13 relates a little bit to what Mr. Davidson was arguing  
14 about adjournment at the time -- I guess the reason  
15 that I didn't think that adjournment was going to be  
16 of any help was because, as Mr. Benjamin pointed out,  
17 y'all had been trying to talk to this guy for two  
18 years, and he wasn't talking to you. And I didn't  
19 know what adjournment was going to do. It looked to  
20 me like the only thing I could really do for the  
21 defendants is tell the Government: Don't put him on  
22 as witness one; push him way down, give you some time  
23 to prepare. But all you were going to be able to  
24 prepare from, in a reality sense, was not your own  
25 investigations, but really from what Mr. Jaramillo



1 was telling Mr. Acee. That was it. There wasn't  
2 going to be any other real source of information.

3 Your thoughts on that? That's my memory as  
4 to why I didn't think adjournment was --

5 MR. CASTLE: Yes, Your Honor. If trial in  
6 this case -- without disclosing work product, in  
7 essence, but if a new trial in this case were to be  
8 granted, the defense would be doing background  
9 investigation on Mr. Jaramillo that went beyond just  
10 talking to him. In fact, almost every one of these  
11 witnesses in this case refused to talk to the  
12 defense. And so we didn't use that as a primary  
13 investigative tool. We talked to neighbors, we  
14 talked to family members. We pulled records on prior  
15 convictions. We looked at whether they had a history  
16 of dishonesty. We subpoenaed their records from the  
17 Department of Corrections, which the Court had  
18 granted on numerous occasions.

19 We didn't have Mr. Jaramillo's Department  
20 of Corrections records to see, you know, where his  
21 cell block, where his cell was, who he'd been with,  
22 whether he had other infractions, those kinds of  
23 things. We weren't able to look to see if he had  
24 mental health issues at all.

25 So those are the kinds of investigative

1 tools that would have been used, and were used at  
2 trial to effectively cross-examine people. For  
3 example, like Eugene Martinez was used, not a single  
4 part of examination of Eugene Martinez was based upon  
5 a voluntary interview that Mr. Martinez had with the  
6 defense. Same thing with Mr. Lujan. That was -- the  
7 cross-examination there was based upon his Department  
8 of Corrections records and his performance there at  
9 the Department of Corrections, his mental health  
10 history, and things of that nature.

11 So the effective cross-examinations are  
12 often independent of the witness' statements. And so  
13 that's the kind of material that we would have been  
14 able to obtain with an adjournment. The reason I  
15 said three days is not, it wouldn't have been  
16 sufficient, is I think that number was in a normal  
17 case, where someone is indicted within a reasonable  
18 time, like a year, of a crime, and there are very few  
19 witnesses.

20 Given the fact that this case happened so  
21 many years before, the need for a longer adjournment  
22 was apparent.

23 THE COURT: All right. Thank you, Mr.  
24 Castle.

25 Did anybody else have anything they want to

1 say on the defense side? I see you standing up,  
2 Mr. Burke. Did you have anything further?

3 MR. BURKE: No, Your Honor.

4 THE COURT: All right. Mr. Castellano, if  
5 you wish to respond to Mr. Joe Gallegos' and  
6 Mr. Troup's motions for a new trial.

7 MR. CASTELLANO: Yes, Your Honor.

8 THE COURT: Mr. Castellano.

9 MR. CASTELLANO: Addressing real quickly  
10 Mr. Castle's comments about remedies and the things  
11 of that nature --

12 THE COURT: Can I ask Mr. Castle a  
13 question?

14 MR. CASTELLANO: Sure.

15 THE COURT: This has nothing to do with the  
16 motion for new trial. But it was something you said  
17 at the beginning about the resources. And you were  
18 kind enough, Mr. Castle, to spend some time on this  
19 new proposal for us to have someone over at the  
20 Federal Public Defender's office reviewing bills and  
21 things. How is that working out? We now have --  
22 this case has lasted long enough to be under my  
23 regime, where I reviewed every voucher. And now  
24 we've got Marc Robert over there. How is it working  
25 out? Does anybody have any sense of that?

1 MR. CASTLE: It started off rough, but it's  
2 much better. I can tell the Court, in Albuquerque,  
3 in New Mexico, is so much better than the Central  
4 District of California that prides itself on its, I  
5 guess, status in the country. So I have no problems  
6 with it over the last year or two.

7 THE COURT: How about you, Mr. Burke?  
8 Weren't you the one that wrote me a letter, and I  
9 shared it with all my colleagues?

10 MR. BURKE: I did.

11 THE COURT: And how -- comparing regimes,  
12 what do you think?

13 MR. BURKE: I believe that Mr. Castle's  
14 comments are the same as mine. I think it has worked  
15 out. It seems to be working out better.

16 THE COURT: Okay.

17 MR. BURKE: And I've always -- I just don't  
18 know judges that really want to be doing it,  
19 personally.

20 THE COURT: Yes. I certainly have  
21 colleagues that feel that way. I mean, I guess I  
22 don't walk into each day and say: Well, these are  
23 the ten things I want to do and the ten things I  
24 don't want to do, and then act accordingly. I mean,  
25 we all have stuff we've got to do.

1           Okay. I appreciate that. I wondered what  
2           you thought about -- now that -- and I relied heavily  
3           on your comments to vote on that issue. I keep  
4           wondering if it's a new fangled thing, and wonder  
5           where we'll be five years from now, if we'll all  
6           still be thinking it's a good idea. But anyway, I  
7           looked at your comments, and I appreciate them again,  
8           and used them to vote. And let's give it a try.

9           Thank you, Mr. Burke.

10          THE COURT: All right. Mr. Castellano.

11          MR. CASTELLANO: Thank you, Your Honor.

12          Starting with Mr. -- some of Mr. Castle's  
13          comments regarding what's fair and what options we  
14          have at this point. The case law typically tells us  
15          that, as the Court mentioned earlier, finality is  
16          something that we need in criminal cases and in other  
17          cases. And at this point I would ask the Court not  
18          to grant the new trial, because finality is what  
19          we're looking for. New trials are disfavored. And  
20          the defendants have a right to appeal. So this isn't  
21          the last step for them or the last chance they have  
22          at any remedy. The real remedy in this case will be  
23          an appeal. And I think these arguments this morning  
24          really aren't addressed towards this Court. I think  
25          they are addressed to the appellate court. Which is

1 appropriate. I think that's ultimately where the  
2 decision needs to be made on this based on finality  
3 and the fact that new trials are disfavored.

4 To answer your question earlier, I think  
5 you did file an order which was Doc 2207.

6 THE COURT: Is it just an order, or was it  
7 a memorandum opinion? Because I've got, floating  
8 around somewhere --

9 MR. CASTELLANO: I think it's a shorter  
10 opinion. It's an order, it's a short order. And  
11 then the Court also filed a chart with James  
12 statements related to Mr. Jaramillo, which was Doc  
13 2206.

14 THE COURT: Yeah, I need to find -- I  
15 worked -- it just may not have gotten filed. I spent  
16 a long time on Jaramillo. And I've got an opinion  
17 out there. So I need to get it out to you, and then  
18 review it to refresh my memory of exactly where I was  
19 in allowing him to go forward.

20 MR. CASTELLANO: And, Your Honor, Mr. Burke  
21 had a good point. Ultimately, I mean, obviously,  
22 he's coming from an advocate position, we're coming  
23 from an advocate position, but what matters is what  
24 the Court thinks. And the Court has already told us  
25 what the Court thinks on each of these issues.

1           The Court has ruled previously on  
2   severance. So unless the Court is willing to take a  
3   different direction on severance at this point, we  
4   have the Court's decision on severance. The Court  
5   did sever the case, made a couple of severances over  
6   all the cases. So the Court thought about these  
7   issues, and I think ruled appropriately. There was a  
8   question, or a comment by Mr. Burke earlier about the  
9   Court giving us an hour over lunch to come up with  
10   options for the Court regarding possible severance.

11           And it was actually Mr. Potolsky who made  
12   the same argument that Mr. Burke did today. You gave  
13   us time to come up with three options. And I  
14   explained to the Court today that we only had an  
15   hour, and that was the best we could come up with in  
16   that time. So certainly it wasn't in violation of  
17   any order of the Court. We explained that that was  
18   the best option we could come up with in that period  
19   of time. Everyone was pressed for time. And  
20   ultimately, the option we came up with was the best  
21   option, because everybody had his or her day in  
22   court, and everybody had one trial. And that  
23   ultimately was the best conclusion we could reach.

24           THE COURT: All right. Mr. Castellano,  
25   before we go on, would this be a good time for me to

1 give Ms. Bean a break and let her rest her fingers?

2 MR. CASTELLANO: Sure.

3 THE COURT: All right. We'll be in recess  
4 for about 15 minutes.

5 (The Court stood in recess.)

6 THE COURT: Let's go back on the record. I  
7 think we've got all the defendants and attorneys in.  
8 Mr. Castle, are you back on the phone? Mr. Cooper,  
9 you might want to see if he's going to join us. Mr.  
10 Castle, are you there?

11 MR. CASTLE: I am, Your Honor.

12 THE COURT: All right. Mr. Castellano, if  
13 you wish to continue your argument on Mr. Troup and  
14 Mr. Joe Gallegos' motions for new trial, you may do  
15 so at this time.

16 MR. CASTELLANO: Thank you, Your Honor.

17 THE COURT: Mr. Castellano.

18 MR. CASTELLANO: I won't argue anymore on  
19 severance. The Court has ruled on that. So unless  
20 the Court is inclined to change direction, I will  
21 rely on the Court's prior ruling.

22 My next is Michael Jaramillo. And the  
23 Court has also ruled on that. What I can tell the  
24 Court is that he didn't debrief ultimately until  
25 April 18, which is when we learned that he would be



1 willing to testify in the case.

2 The pen pack had been disclosed on him on  
3 October 18 of 2016, so a year-and-a-half earlier. So  
4 in anticipation of the chance that he might testify,  
5 we disclosed the STIU file on April 13, 2018, and his  
6 location history on April 16, 2018. And if I  
7 remember correctly, the defense did impeach him from  
8 the STIU file, including a run-in he had with someone  
9 else in the prison.

10 So I understand it may not be what they say  
11 they ultimately would have preferred, but they  
12 certainly had impeachment material on him, including  
13 the fact that he denied those charges, even to their  
14 investigator. So he gave them something to impeach  
15 him with, even then.

16 And I liken Mr. Jaramillo to DNA or DNA  
17 evidence with fingerprint that's found on the eve of  
18 trial. In those circumstances, any court has to  
19 figure out the best remedy for what the court will  
20 do: Whether that's a continuance, whether it's a  
21 mistrial, whether the evidence can be used at trial  
22 after a delay with the chance for the defense to get  
23 its ducks in a row to address that. And the Court  
24 did that in this case.

25 I attached part of the Court's reasoning to

1 our response. And the Court indicated, as it says,  
2 "I indicated on Friday -- I think it was Friday --  
3 the thing we're struggling with Mr. Davidson -- and I  
4 pointed out to him what the remedy is. As we know  
5 from the face of the statute there is no remedy to  
6 the violation. And I therefore have to consider what  
7 remedy should be. I concluded that exclusion is not  
8 an appropriate remedy in this case. I think that's  
9 too Draconian in this case. I know the defendants  
10 have made arguments that they would have approached  
11 certain things in the case differently. But I don't  
12 think they would have approached it differently.  
13 Because even if the Government had put Mr. Jaramillo  
14 on a witness list as a may call, they still at that  
15 time didn't know what his testimony would be. So I  
16 don't think that they would have done anything than  
17 much differently than what they had, in fact, done.

18 "I think the remedy that is appropriate  
19 here is what I've done so far, and what I will  
20 continue to do, if that's necessary and the defense  
21 requests it, is push this evidence down so the  
22 defendants have more time to deal with Mr. Jaramillo.  
23 I don't think we're probably to the point that we've  
24 done all we can. But I think that the situation is  
25 that this is too high of a cost to the seeking

1 function to exclude this witness, and that the  
2 violation of the statute can be dealt with by pushing  
3 the testimony down to make sure that the defendants  
4 are fully prepared to deal with it. And I think  
5 we've probably dealt with that situation. If the  
6 defendants think they need more time or want more  
7 time, I'll probably bend over backwards to try to  
8 accommodate that. But I don't think exclusion is the  
9 appropriate remedy."

10 And the Court did that, the Court bent over  
11 backwards to accommodate the defendants.  
12 Mr. Jaramillo was pushed back late in the trial, and  
13 testified a month later, on May 14th, 2018.

14 And so I think all that was addressed.

15 One other passing comment was there was an  
16 allegation that the Government knew Mr. Jaramillo  
17 from DNA evidence. And actually Agent Acee was  
18 cross-examined on that at trial by Mr. Burke. And  
19 Mr. Acee indicated that none of the DNA reports  
20 themselves had any indication that Mr. Jaramillo was  
21 listed, and was not listed on the DNA reports.

22 Over my objection, Mr. Burke put on the  
23 visualizer a document that was not admitted into  
24 evidence, and those were the field notes by the DNA  
25 analyst. And the field notes said there was some

1 indication or trace evidence of DNA submitted for  
2 Mr. Jaramillo. It's simply not true to say we knew  
3 about him that far back, unless you went into the  
4 minute details of the notes in this case. So  
5 Mr. Jaramillo did not show up on an actual DNA lab  
6 report.

7 That's all I have regarding Mr. Jaramillo,  
8 Your Honor. Once again, you have ruled on this.  
9 And, once again, unless the Court is inclined to  
10 change its position, the Court should deny the motion  
11 on that basis, leaving us only the jury instructions.

12 And Mr. Troup's team, I think this morning  
13 is in the unenviable position of effectively arguing  
14 that they were ineffective at trial. And that's a  
15 tough position to be in, I think, to now argue to the  
16 Court that you were ineffective, and today to  
17 convince the Court of that.

18 THE COURT: Well, putting that predicament  
19 aside, they make a point in their reply where they  
20 really have the heart of their instruction argument  
21 that you're conceding that I made some errors in the  
22 jury instructions. Are there any errors that the  
23 Government thinks the jury instructions contained?

24 MR. CASTELLANO: No, Your Honor. And what  
25 the defense alleges is that because we didn't address

1 certain points, we were conceding those points. But  
2 we weren't. Because the main point was that the  
3 burden is on them under the plain error standard.  
4 And so I made --

5 THE COURT: But after looking at  
6 Mr. Burke's reply and all the instructions that he  
7 lays out there, is there any one that you're going to  
8 go up to the Tenth and say: You know what, the judge  
9 got it wrong, but it's plain error -- it doesn't  
10 satisfy the plain error test? Or are you going to  
11 argue substantively that every one of those is  
12 correct?

13 MR. CASTELLANO: I won't have the final say  
14 on that, because I'm not in the appellate division.  
15 But I don't foresee us conceding error.

16 What I can tell the Court is, in response  
17 to the reply, I did only a short amount of research  
18 regarding the murder instruction. The case from the  
19 Tenth Circuit, or at least the one case I was able to  
20 find is U.S. v. Pearson. It's at 203 F.3d 1243.  
21 It's from the Tenth Circuit in 2000. What it states  
22 is -- this is at Headnote 22 of the case, "Although  
23 commission of a specified felony supplies the  
24 constructive malice necessary to satisfy the malice  
25 aforethought element of Section 1111 for felony

1 murder" -- there it's talking about felony murder,  
2 and then moves on to second degree murder -- "second  
3 degree murder, malice aforethought element is  
4 satisfied by, one, intent to kill without the added  
5 ingredients of premeditation and deliberation; two,  
6 intent to do serious bodily injury; three, a depraved  
7 heart; or four, commission of a felony when the crime  
8 does not fall under the first degree murder  
9 paragraph, Section 1111(a)."

10 And so the theory of second degree murder  
11 in New Mexico was the intent to do serious bodily  
12 injury. So the instruction for second degree murder  
13 the Court gave says that "the defendants knew their  
14 acts created a strong probability of death or great  
15 bodily harm to Mr. Castillo." So that's where the  
16 great bodily harm is mentioned.

17 So the Tenth Circuit has spoken on the  
18 requirements for second degree murder, and that's  
19 what I found related to their reply, Your Honor.

20 I do --

21 THE COURT: What do you think of this  
22 theory that Mr. Troup is advancing that it has to be  
23 a generic murder charge there? It can't be first  
24 degree, second degree; it's just got to be a generic  
25 murder charge for that?

1 MR. CASTELLANO: I think he's right about  
2 that. I think that generally the generic or a  
3 generic definition of murder applies. And so you can  
4 use the law of any of the states, if it generally  
5 meets those requirements. So what Congress said was:  
6 You can't just rely on all 50 states; you need to  
7 figure out whether or not the statute being used  
8 meets the requirements of a murder.

9 And that's actually the reason why we  
10 submitted two theories of murder, first and second,  
11 because we thought both of those met the generic  
12 definition of murder. And that's actually why we had  
13 two theories there.

14 THE COURT: And the case that you're citing  
15 here -- I'm just slow so bear with me -- you're  
16 citing this Tenth Circuit case for what proposition?

17 MR. CASTELLANO: Well, what qualifies as --  
18 what intent is required for second degree murder in  
19 the Tenth Circuit.

20 THE COURT: So you're saying because this  
21 satisfies the definition in the Tenth Circuit, it  
22 would satisfy a generic definition of just murder for  
23 the VICAR purposes?

24 MR. CASTELLANO: I believe it would.

25 THE COURT: What's the name of this case?

1 MR. CASTELLANO: It's Pearson. Again, it's  
2 at 203 F.3d 1243, Tenth Circuit, 2000. In that case  
3 Pearson actually could not be convicted of second  
4 degree murder because the robbery and accidental  
5 killing didn't satisfy the types of implied malice  
6 required because he testified that he had  
7 accidentally fired and shot and killed the victim.  
8 So an accidental killing in that case did not meet  
9 the requirements for second degree murder.

10 So in terms of the jury instructions, I  
11 only gave passing comments on each of those as  
12 additional reasons why the Court should deny the new  
13 trial. But ultimately, the burden is on the defense  
14 for plain error. And so that's why there isn't more  
15 argument on each of those, because it's not our  
16 burden related to the instructions. And as the Court  
17 knows, you look at the instructions in the context of  
18 the entire trial to determine whether or not the jury  
19 had the right law on the right facts to apply to come  
20 to a verdict.

21 So that's my short argument. Because I am  
22 relying on the Court's rulings, and as I said, unless  
23 the Court is willing to change direction on any of  
24 these, the Court should, therefore, deny the new  
25 trial motions.



1 THE COURT: What would you think about a  
2 request from me to you to talk -- who is going to do  
3 the appeal? Mr. Richardson?

4 MR. CASTELLANO: Maybe Richard Williams,  
5 possibly.

6 THE COURT: Richard Williams. All right.  
7 What if you ask him to look now at this jury  
8 instruction, the reply, and see if he's going to  
9 confess error on any one of those instructions and  
10 then just rely on plain error review, or whether he's  
11 going to defend substantively each one of those jury  
12 instructions, and then just send me a letter and tell  
13 me how the Government is going to proceed.

14 MR. CASTELLANO: I'll do that, Your Honor.

15 I also disagree with the argument by  
16 Mr. Burke that misprision was an option. Because  
17 misprision not only requires not reporting the crime,  
18 it requires an affirmative act to cover up that  
19 crime. And I just don't see there is any evidence in  
20 the record where that happened.

21 THE COURT: Well, is -- and my memory is  
22 vaguer on that than some of the other issues that are  
23 raised here, but my memory is that you did not want  
24 to go to the jury on that theory; you didn't want --  
25 either you wanted a conviction on VICAR or nothing at

1 all.

2 MR. CASTELLANO: I don't recall that  
3 specifically either, but that's certainly a decision  
4 we would have made. We would have not agreed to  
5 submit that instruction.

6 THE COURT: And it's not technically a  
7 lesser included offense, because the elements are  
8 different.

9 MR. CASTELLANO: I agree.

10 THE COURT: All right. Anything else,  
11 Mr. Castellano?

12 MR. CASTELLANO: No, Your Honor.

13 THE COURT: All right. Thank you,  
14 Mr. Castellano.

15 Mr. Burke.

16 MR. BURKE: Thank you, Your Honor.

17 THE COURT: Mr. Burke.

18 MR. BURKE: I just want to -- the Court has  
19 fleshed out some discussion about Jaramillo, so I  
20 won't be too long on that. But I would point out  
21 that what happened was, somehow or another, Sonia  
22 Salazar was able to IPRA some files from the  
23 Department of Corrections on Jaramillo, and we were  
24 able to -- and they arrived on May 8. So we had a  
25 very short period of time to use those. And we did

1 do some things with those records, although I believe  
2 that the cross-examination was not terribly  
3 effective. But what did show up as a result of that  
4 IPRA request -- those are records we got, the  
5 Government didn't provide those to us, those were  
6 Department of Corrections records. And  
7 Mr. Castellano is correct, we did use those to  
8 impeach him. But what it pointed out was -- for  
9 example, there was a video that was referenced in  
10 those records. And we were unable to get the video  
11 promptly. So we were unable to cross-examine him  
12 from the video. And there are very few things that  
13 are more dramatic for a jury than to have a witness  
14 under oath being proven to be a liar by a video. So  
15 that's one example.

16 And I would point out concretely that the  
17 Billy Garcia investigative team, they're the ones  
18 that finally ran to ground that Eugene Martinez had  
19 been lying all these years about witnessing his  
20 father's and brother's murder. That was just hard  
21 rock mining that was done.

22 And you know, I'm an advocate, so I don't  
23 know whether I'm reliable on this. But I remember  
24 looking at the jury, and when they figured out that  
25 Eugene Martinez was lying about witnessing his

1 father's death, I think that was it for Eugene  
2 Martinez. But that's the kind of thing that you need  
3 months and longer to develop.

4 And so the Court makes a legitimate point  
5 about what else would you have done. But there  
6 really were things that we would have done to be more  
7 effective in our cross-examination of Jaramillo.

8 And I wasn't sure exactly what  
9 Mr. Castellano was saying about the Jaramillo DNA.  
10 But the discovery that they provided us, 13063, says  
11 "indications of Jaramillo." I believe it's a trial  
12 exhibit. There is nothing vague about it. We got it  
13 from them. And so the suggestion that somehow -- and  
14 in the top right corner it's dated May 23, 2001. And  
15 it says it's on the cord. So I'm not real clear what  
16 that argument was. But beginning May 23, 2001, there  
17 is a DNA document in the DPS crime lab file that we  
18 got from them saying "indications of Jaramillo."

19 And finally, I did note that when there was  
20 the discussion of the Pearson case, there was no  
21 language similar to the language in the second degree  
22 murder statute of New Mexico talking about a strong  
23 probability, which is very loose, and not the sort of  
24 thing that goes with a general idea of murder.

25 And that's all I have, Your Honor.

1 THE COURT: All right. Thank you,  
2 Mr. Burke.

3 MR. BURKE: Thank you.

4 THE COURT: Mr. Benjamin, do you have  
5 anything you want to add related to your motion,  
6 or --

7 MR. BENJAMIN: No, Your Honor.

8 THE COURT: -- anything else? How about  
9 any of the other defendants? Anybody want to say  
10 anything?

11 Well, I want to track this opinion down  
12 that I know that I worked very hard on to try to  
13 satisfy myself. But while there was a violation of  
14 the statute, he should not be excluded. So if I did  
15 not issue that, then I will try to find it and get it  
16 issued. I thought I completed work on it, but it may  
17 not have gotten out the door. But in any case, I  
18 think I have probably done everything I can do on  
19 Jaramillo. I'll review that opinion to try to put  
20 myself and my thinking back into where I was that  
21 first week of trial. But I think I have done  
22 everything I can on Jaramillo. I think I pushed him  
23 down. I thought there was a lot of things that he  
24 was impeached about. And so I thought, given the  
25 limited amount of information that everybody had

1 about Jaramillo, we did what we did with -- had to do  
2 with him at trial.

3 As far as severance, I recall -- I've got a  
4 big work table in my chambers back in Albuquerque,  
5 and I remember spreading out all the defendants early  
6 on, and just staring day after day as I'd walk by,  
7 and playing with different combinations. And because  
8 of the experience of the district judges in the  
9 Second Circuit, and mostly there in the Eastern  
10 District of New York, the Southern District of New  
11 York, they handle some big defendant cases a little  
12 bit more often than we do here. I did want to push  
13 these numbers down into single digits. I was  
14 somewhat guessing who might be at trial, who wasn't  
15 going to be at trial, what we were all hearing about  
16 different defendants, and then staring at the  
17 combinations of counts and defendants. At the time  
18 you didn't know exactly how that was going to play  
19 out, and so I always left open the possibility of  
20 further severances. But as it came down to trial  
21 time, I actually thought that I got it about right.  
22 And so I feel somewhat comfortable going into both  
23 trials.

24 I remember -- certainly I thought about the  
25 first trial, four defendants; got that about right.

1 I was still sort of thinking as I went through that  
2 trial where we were going to be on the second trial,  
3 and thought it was about right. And then on the  
4 third trial, which isn't DeLeon, but it was Mr.  
5 Baca's case, I thought we got it about right.

6 So given the number of defendants we  
7 started with and the amount of counts we had, those  
8 things of that nature, I think the severance was a  
9 good break. I think it needed to be break -- I still  
10 believe it needed to be broken up once. But I'm not  
11 convinced that it didn't work out fairly well with  
12 that.

13 So I'm not inclined to revisit the  
14 severance. I think probably that is an issue the  
15 Tenth Circuit ought to look at. Because I guess I'm  
16 feeling, both before the trials and then after the  
17 trials and during the trials, it was working out  
18 pretty well given the decisions that had to be made.

19 On the jury instructions, I want to look a  
20 little bit more at the jury instructions, but I'm  
21 inclined to think that almost all of them I can say I  
22 don't feel there is any error there.

23 I want to look a little bit closer at this  
24 new issue in the reply about the murder charge and  
25 the arguments that are made there, because those are

1 new. And I just need to study the law. It may be  
2 that I got it right; it may be that there is error  
3 there, but I think it's going to be a plain error. I  
4 don't think it substantively infected the trial. And  
5 so I'm not inclined to grant a new trial on that. I  
6 do want to see what the Government has to say, and I  
7 want to look at some of these cases that have been  
8 brought to my attention. But it seems to me that,  
9 even if there is some error there, under a plain  
10 error review, it's pretty difficult if we didn't get  
11 around to it until we found it in the reply, I think  
12 it's a little hard to say it's plain error, given as  
13 hard as we worked on those instructions.

14 So I'm inclined to not grant any motion for  
15 a new trial on the basis of the arguments that  
16 Mr. Troup and Mr. Joe Gallegos have raised. But I'll  
17 look at it and I'll give you an opinion on that.

18 All right. Let's move then to, I guess  
19 it's Arturo Garcia's motion for acquittal. Mr.  
20 Davidson, if you wish to argue that motion. I know  
21 that's been joined by a couple other defendants,  
22 including Mr. Billy Garcia and Mr. Troup, and maybe  
23 others.

24 MR. DAVIDSON: Thank you, Your Honor.

25 THE COURT: Mr. Davidson.



1 MR. DAVIDSON: You'll recall that at  
2 trial --

3 THE COURT: When I was reading your motion,  
4 it looked to me like you were giving a document  
5 number which struck me as how incredibly high a  
6 number that is, a four-digit number, and it had a 2  
7 in front of it, if I recall. That is the opinion I  
8 did get out on the interstate commerce here?

9 MR. DAVIDSON: Yes, Your Honor, it was --

10 THE COURT: Give me the date on that  
11 opinion.

12 MR. DAVIDSON: -- 2378.

13 THE COURT: And it came out when? I think  
14 it came out after I got back to Albuquerque, right?

15 MR. DAVIDSON: It came out -- I want to say  
16 in August or September. I'm not sure exactly the  
17 date.

18 THE COURT: I think it's August, because --

19 MR. DAVIDSON: I know you had not issued it  
20 as of the June 14 hearing on the Baca matter.

21 THE COURT: That is true.

22 MR. DAVIDSON: And I had filed my written  
23 motion on, I believe, October 16. So somewhere in  
24 the middle there.

25 THE COURT: Now, it's my memory in that

1 opinion I dealt with the issues that you raised, both  
2 when you were making the oral directed verdict and  
3 the motions during trial. It dealt with those, and  
4 it dealt with those that were in the written  
5 document. But I think I held out -- did I end up  
6 holding some option that you could come back and  
7 argue on the connection between Mr. Garcia's -- the  
8 crime here, and interstate commerce, because he was  
9 coming under the prong of trying to advance his  
10 position within the enterprise rather than with drugs  
11 or drug transaction? I think I ended up --

12 MR. DAVIDSON: Correct.

13 THE COURT: -- after thinking about it  
14 overnight saying: The drugs, if that's the way  
15 you're going, I'm going to deny motion for summary  
16 judgment interstate commerce, but I want to think  
17 more about whether advancing yourself in an  
18 enterprise without any sort of drug connection,  
19 whether that would satisfy it.

20 MR. DAVIDSON: Correct. And so --

21 THE COURT: In the opinion did I leave that  
22 open, or did I end up foreclosing that?

23 MR. DAVIDSON: Well, in the opinion -- the  
24 opinion didn't deal with anything I had submitted in  
25 writing. It was just dealing with the oral

1 arguments.

2 THE COURT: And that was because this issue  
3 that I'm talking about right now was not part of your  
4 oral motion, right?

5 MR. DAVIDSON: I believe it was part of the  
6 oral motion. So what we argued in the oral motion  
7 were three things, Your Honor. One was for dismissal  
8 under Rule 12 (b)(2) for lack of jurisdiction. And  
9 that kind of dovetails with a facial challenge to the  
10 constitutionality of VICAR's exceeding Congress'  
11 authority under the Commerce Clause. And the third  
12 argument was the as applied challenge, which Your  
13 Honor is just referring to. So I think at this point  
14 I'll stand on the briefing that we already have with  
15 respect to the 12(b)(2) lack of jurisdiction and the  
16 facial challenge to VICAR, and focus on the as  
17 applied.

18 And what Your Honor wrote in the memorandum  
19 opinion and order, Document 2378, was that --

20 THE COURT: What did I say specifically  
21 about this one, where your client was -- the theory  
22 the Government was going to the jury on was that he  
23 did the crime to advance his position in the SNM  
24 organization?

25 MR. DAVIDSON: You didn't address that in

1 depth, Your Honor. What you said in the order was  
2 that an as applied challenge on Commerce Clause  
3 grounds to VICAR is a contradiction in terms. And  
4 there were three cases that you cited there:  
5 Perez --

6 THE COURT: So didn't I -- by making that  
7 comment, wasn't I rejecting the argument that you  
8 could say, because of the theory here -- that you  
9 could argue that because of the theory that the  
10 Government chose, you couldn't say that then the  
11 VICAR statute was unconstitutional as applied?  
12 Wasn't I, in the end, rejecting this issue that I had  
13 left open?

14 MR. DAVIDSON: Yes, I think that's correct.

15 THE COURT: That's what I meant by -- I  
16 don't think there is -- I don't think you get to  
17 argue this. There is not a doctrine out there that  
18 really allows you to make this argument.

19 MR. DAVIDSON: And so I guess what I'd like  
20 to focus on this morning is why I think that you  
21 should reconsider that line of reasoning, that  
22 proposition, and to see if I can convince you that  
23 there is an opening for an as applied challenge to  
24 VICAR, particularly with the facts regarding Count 3  
25 for Arturo Garcia in the Freddie Sanchez murder.

1           The first point there, Your Honor, is that  
2     the murder of Freddie Sanchez is unlike the types of  
3     activities in the cases cited by the Court in the  
4     memorandum opinion and order. One of the cases was a  
5     U.S. Supreme Court case Perez, which involved a  
6     statute that criminalized loan sharking, extortion in  
7     credit transactions. Well, loan sharking is  
8     obviously a form of economic activity. And so the as  
9     applied challenge was rejected there because the  
10    activity is economic.

11           The second case cited was Taylor. It was  
12    also a U.S. Supreme Court case. And that involves  
13    Hobbs Act robbery. In that case, the defendants  
14    attempted to steal or stole drugs or drug proceeds.  
15    And the court noted there that the market for illegal  
16    drugs is commerce over which the federal government  
17    has jurisdiction. Again, Hobbs Act robbery is  
18    involved with economic activity and commerce.

19           The third case cited, and I believe it was  
20    cited by the Government or relied on in their brief  
21    in response to my brief was Farnsworth, which was a  
22    922(g) felon in possession case. And again, Congress  
23    chose to, with 922(g)(1) regulate interstate commerce  
24    in firearms, and wanted to exclude felons from that.  
25    And the way they did that under the necessary and

1 proper clause was to then ban possession as well.  
2 And courts have held that banning possession, even  
3 though possession per se is not commerce, it was an  
4 effective way for Congress to regulate the market in  
5 firearms, and exclude felons from that.

6 So those three examples: A felon in  
7 possession of a firearm, Hobbs Act robbery, and loan  
8 sharking are all very much more connected to economic  
9 activity than the Freddie Sanchez homicide, and  
10 anything, construing the evidence in the light most  
11 favorable to the Government, Arturo Garcia was shown  
12 at trial to have done.

13 In the Government's briefing it does not  
14 dispute, and in fact tacitly concedes that Freddie  
15 Sanchez was not involved in drug trafficking, in any  
16 drug trafficking activity of the SNM. In the  
17 Government's answer brief there was no dispute of the  
18 noneconomic nature of the Freddie Sanchez homicide.  
19 And their brief is Document 2435.

20 The only statements regarding drug  
21 trafficking anywhere in their brief is to the effect  
22 that the SNM itself engaged in drug trafficking, not  
23 that Freddie Sanchez did, or that the Freddie Sanchez  
24 homicide was related in any way to the drug  
25 trafficking activity of the enterprise.

1           The Freddie Sanchez homicide and my  
2     client's involvement in it, again construing the  
3     evidence in the light most favorable to the  
4     Government, has less of a connection to interstate  
5     commerce or activity of an economic nature than the  
6     Court's hypothetical.

7           Now, in Your Honor's memorandum opinion and  
8     order at page 8, Footnote 4, the Court identified as  
9     a scenario where commercial activity does not affect  
10    more than one state, the following hypothetical:

11    Your Honor said: "Imagine a small group of people  
12    become stranded in a remote location, Alaska perhaps,  
13    with no realistic possibility of escape. Bartered  
14    transactions with that group would qualify as purely  
15    intrastate commerce."

16           Now, taking that hypothetical that Your  
17    Honor proposed in the memorandum opinion and order,  
18    Document 2378, and comparing the evidence that came  
19    out at trial regarding the Freddie Sanchez homicide,  
20    there is less of a connection to economic activity  
21    for anything interstate involving economic activity  
22    than in the hypothetical. Barter is obviously  
23    economic activity. The Freddie Sanchez is  
24    noneconomic. The only way you could connect the  
25    Freddie Sanchez murder to interstate commerce is to

1 pile inference upon inference to meet the commerce  
2 element.

3 And there is a very well-reasoned opinion,  
4 Your Honor, from the Eastern District of Michigan in  
5 1999. My research indicates that it's still good  
6 law. It has been disagreed with by other courts.  
7 And I have a couple copies of that opinion, if you'd  
8 like to see it. And I have one for the Government as  
9 well.

10 THE COURT: Sure, I'd like to see it.

11 MR. DAVIDSON: In the Garcia case -- this  
12 is from the Eastern District of Michigan 1999, Judge  
13 Nancy Edmunds, a Bush appointee for 1992, she noted,  
14 "The Court here" -- referring to the U.S. Supreme  
15 Court in Lopez, in which U.S. Supreme Court struck  
16 down the Gun-free School Zones Act as overreaching  
17 commerce clause power of Congress. She noted that,  
18 "The Lopez court rejected the Government's argument  
19 that crime in general has a negative effect on  
20 interstate commerce, and cautioned against piling  
21 inference upon inference in a manner that would bid  
22 fair to convert Congressional authority under the  
23 Commerce Clause to a general police power of the sort  
24 retained by the states."

25 The only way you can connect the Freddie



1 Sanchez homicide to interstate commerce is by  
2 engaging in that sort of inferential piling upon  
3 inference that the U.S. Supreme Court in Lopez  
4 forbade.

5 So the three cases that I would argue, Your  
6 Honor, that you could rely on in getting to the  
7 relief we're requesting are the following: The Lopez  
8 case in 1995, where they struck -- the U.S. Supreme  
9 Court struck down the Gun-free School Zones Act;  
10 Morrison, in 2000, where they struck down the civil  
11 remedy provision of the Violence Against Women Act;  
12 and the third is this district court case from the  
13 Eastern District of Michigan, from 1999, the Garcia  
14 case.

15 Under these three cases, Your Honor, I  
16 think that the Court should interpret Section  
17 1959(a)(1), the critical provision of the VICAR  
18 statute that's implicated here, that section should  
19 be interpreted to require a substantial effect on  
20 interstate commerce.

21 In the Government's briefing I understand  
22 them to be arguing that only a minimal or de minimis  
23 effect on interstate commerce is needed. So their  
24 argument, as I understand it -- and Mr. Castellano  
25 can certainly ably speak for the Government -- but as

1 I understand their argument and their theory of the  
2 case, they don't need to show any connection between  
3 the Freddie Sanchez homicide and any economic  
4 interstate activity. All they have to show is that  
5 it was done in furtherance, for Mr. Garcia to  
6 maintain or further his position within the gang.  
7 And then because the next inference is that because  
8 the SNM Gang was involved in drug trafficking  
9 activity -- which certainly the evidence at trial  
10 showed -- their argument is that that's how you get  
11 to jurisdictional hook for Congress to regulate this  
12 sort of activity, and for this Court to have the  
13 authority to punish it.

14 THE COURT: What do you think -- I mean,  
15 granted, I've now put it into an opinion -- about my  
16 thought that you can't raise these? You know, I  
17 understand what she's saying, and I left it open for  
18 another day. But what do you think about my argument  
19 or my conclusion that you just can't raise an as  
20 applied challenge to -- in an interstate commerce  
21 case? And that's not what's going on in the Supreme  
22 Court cases. They're not saying as applied to this  
23 defendant it's unconstitutional. They're saying the  
24 statute is unconstitutional.

25 MR. DAVIDSON: I thought that in the

1 Gonzales against Raich case involving the  
2 constitutionality of the Controlled Substances Act,  
3 Justice Stevens' opinion he explained "as applied  
4 challenges are available to statutes regulating an  
5 economic class of activities, because when a general  
6 regulatory statute bears a substantial relation to  
7 the commerce, the de minimis character of  
8 individual's instances arising out of that statute is  
9 of no consequence."

10 So my understanding is, if you take the de  
11 minimis standard as being the standard, then we can  
12 bring an as applied challenge, but it's going to  
13 lose, because all you need is a de minimis standard.  
14 But I think, if you look at the logic of Lopez,  
15 Morrison, and I would argue this well-reasoned  
16 opinion --

17 THE COURT: But that is -- I mean, I don't  
18 criticize the reasoning of the Garcia case from  
19 Michigan. But I'm just saying you don't go down that  
20 path at all. You just don't go there, because you  
21 can't raise -- you can't pick out one defendant and  
22 say: I get to raise an as applied. You just don't  
23 have that ability with the Commerce Clause.

24 MR. DAVIDSON: Except they did that in the  
25 Raich case.

1 THE COURT: I'm not sure they did. I'm not  
2 sure they did. Now, Stevens might have said  
3 something, but I'm not sure that's what they did in  
4 that case. They struck that statute down.

5 MR. DAVIDSON: They had raised a -- well,  
6 no, the Supreme Court upheld the CSA, the Supreme  
7 Court upheld the Controlled Substance Act, and said  
8 that that trumped the California medical marijuana  
9 regime. So that's one where the facial challenge was  
10 rejected by the Supreme Court. And then my  
11 understanding of the Raich case is that Justice  
12 Stevens then went on to look at the as applied  
13 challenge. And clearly, Judge, Garcia --

14 THE COURT: Was he the writer of the  
15 majority opinion?

16 MR. DAVIDSON: Correct, Your Honor.

17 And, of course, Justice Rehnquist wrote  
18 Lopez and Morrison. And those statutes were struck  
19 down facially. But I do think you still do get to an  
20 as applied challenge. In each of the cases where the  
21 court has said: All you need to do is have a minimal  
22 connection were cases where the underlying activity  
23 was already economic. Let me see if I can find those  
24 cases. So the Tenth Circuit in Bolton, which is  
25 relied upon -- that's a Tenth Circuit case from 1995,

1 68 F.3d 396. At page 3999, the court said, "If a  
2 statute regulates an activity which the repetition in  
3 aggregate has a substantial effect on commerce, then  
4 the de minimis character of individual instances  
5 arising under that statute is of no consequence."  
6 But the antecedent of that condition isn't met here.  
7 Because here, the statute, VICAR, doesn't regulate  
8 activity which the repetition in aggregate has a  
9 substantial effect on interstate commerce, because  
10 that line of reasoning has been ruled out by Lopez.  
11 Because as the Court said in Lopez: If you go down  
12 that road of saying Congress gets to regulate crime  
13 because crime in aggregate has a negative impact on  
14 the economy -- which no one would dispute -- the  
15 Supreme Court has said: Then you're going to have a  
16 centralized government, and that destroys Federalism.  
17 So that's against the very structure of the  
18 Constitution; it's against the Tenth Amendment; it's  
19 against Article 1, Section 8, where the Commerce  
20 Clause is; it's against everything that is in the  
21 structure of our government.

22 So the Government in their brief, I think,  
23 cites some cases that have the last part of that  
24 conditional from Bolton. But you don't get there  
25 unless you're talking about a statute that already

1 regulates economic activity.

2 But clearly, a murder that occurs within a  
3 state is not economic activity. So the problem is,  
4 if Congress is regulating noneconomic activity, then  
5 the only way you get to interstate commerce nexus  
6 that would allow Congress to regulate individual  
7 crime is to show a connection between the crime and  
8 interstate commerce. And you can't get there in this  
9 case.

10 Under the Government's theory of the case,  
11 Your Honor, the connection would be that my client  
12 was trying to maintain or increase his position in  
13 the SNM by ordering the hit on Freddie Sanchez. And  
14 because that was the gang-related act, and then the  
15 gang itself is involved in something that impacts the  
16 economy, that via those inferences that gets you to  
17 interstate commerce. But I don't think -- Lopez  
18 basically doesn't allow you to do that.

19 The case, Your Honor, that's very analogous  
20 to my client's situation is this Garcia case from  
21 Michigan. There, the Court said, "Even if the  
22 Government proves beyond a reasonable doubt that  
23 Garcia murdered Evan Ison -- who was the victim in  
24 that case -- "to enhance the power and authority of  
25 the Cash Flow Posse" -- that's his gang in that case

1 -- "and his role within it, that murder still in the  
2 end is a street crime committed by a thug as part of  
3 a local turf war in southwest Detroit."

4 Your Honor, what the Government has done in  
5 this case in Count 3 is to attempt to regulate and  
6 punish a local crime that has no interstate commerce  
7 nexus.

8 If Your Honor has no further questions,  
9 that's all I have.

10 THE COURT: Well, let me hear from the  
11 Government, and then I may have some further  
12 questions.

13 Anybody else want to argue, comment on this  
14 motion? I know there was some joinders and have been  
15 in the past on this interstate commerce issue. I  
16 know that I kind of foreclosed it on those defendants  
17 that were connected to the enterprise by drugs, but I  
18 had this one little issue that I was continuing to  
19 look at.

20 Mr. Benjamin.

21 MR. BENJAMIN: Your Honor, we joined, but  
22 I'm not going to be able to compare to what Mr.  
23 Davidson said. So I join it.

24 THE COURT: All right. Mr. Cooper.

25 MR. COOPER: Your Honor, the same arguments

1 that are made with regard to the Freddie Sanchez  
2 murder are applicable, I believe, to the  
3 Castillo/Garza murders alleged in Counts 1 and 2.

4 THE COURT: All right. Thank you,  
5 Mr. Cooper.

6 Anyone else?

7 All right. Mr. Castellano.

8 Let me ask Mr. Davidson one question before  
9 I hear from you. Was there any appeal of this Garcia  
10 opinion from the judge in the Michigan case?

11 MR. DAVIDSON: Not that I could see, Your  
12 Honor. When I looked at the key cite, I was  
13 wondering the same thing: Why did that not get  
14 appealed? Perhaps, there was some deal that was made  
15 or something after the convictions went away. There  
16 were also RICO convictions and other things going on  
17 in that case. But when I Shepardized it, that's what  
18 I found.

19 And in candor to the Court, it has been  
20 criticized by other courts. But I find it to be more  
21 persuasive than those other courts.

22 THE COURT: Did the defendant that won this  
23 particular motion, did this defendant get convicted  
24 on other charges in this case? I mean, that might  
25 have been the reason the Government didn't do



1 anything with it because the defendant got convicted  
2 on other charges.

3 MR. DAVIDSON: I believe so, Your Honor.  
4 Like I said, there were RICO -- it was a single  
5 defendant case at this point -- and there were RICO  
6 counts as well.

7 THE COURT: I guess -- help me think  
8 through this. I mean, in your particular motion,  
9 it's not really a motion for a new trial. There is  
10 nothing else to be done with a new trial. There is  
11 nobody saying: We've got more evidence or a new  
12 theory or anything like that. So there is no reason  
13 to grant a new trial. The best I could do for you is  
14 to set aside the verdict as to Mr. Garcia, and then  
15 the Government appeal it. Or I leave it in place and  
16 you appeal it. But it looks to me like it's headed  
17 to the Tenth Circuit on this issue regardless. But  
18 it's not a new trial issue. Would you agree with  
19 that?

20 MR. DAVIDSON: Correct, Your Honor. We  
21 didn't ask for a new trial. We asked for acquittal  
22 under --

23 THE COURT: It's just a legal issue that  
24 either I'm getting right or I'm not getting right.

25 All right. Mr. Castellano.

1 MR. CASTELLANO: Your Honor, I like it  
2 better when Mr. Davidson does the appeal. So I like  
3 that option better of the two. So if you leave  
4 things as they are, then Mr. Davidson can get started  
5 on the appeal.

6 I think that what I'm looking at -- I had a  
7 short time to digest the Garcia case, but it seems to  
8 me that the Court, even in that case, indicates that  
9 the activities of the Cash Flow Posse seemed to have  
10 weak ties to commerce. And so I think we're in a  
11 slightly different posture with that case than this  
12 case.

13 There was another part I looked at. The  
14 court, on page 811 of that opinion, in the upper  
15 right-hand corner says, "In this case the  
16 enterprise's connection to interstate commerce is  
17 weak. The government merely alleges that some of its  
18 members drove within the state on an interstate  
19 highway in order to commit acts of murder. It also  
20 alleges that the gun used in connection with the  
21 Racketeering Act alleged in Count 1 may have crossed  
22 state lines."

23 And so, once again, this is a focus on the  
24 enterprise and the court is saying that it's pretty  
25 weak on -- under VICAR and the substantial effect.

1 But I do agree that the case law says that  
2 only a de minimis amount or effect on commerce is  
3 necessary.

4 But one of the other cases I cited, which  
5 was the Miller case, on page 5 of my response, which  
6 states, "Courts have also held that where the  
7 racketeering enterprise's business is narcotics  
8 trafficking, that enterprise must be viewed as  
9 substantially affecting interstate commerce."

10 So even though the case law supports a de  
11 minimis effect on commerce, in this case the SNM was  
12 involved in drug activity, which means there was a  
13 substantial effect on commerce.

14 And they also cite to Congress' findings at  
15 21 USC Section 801(3), once again indicating that  
16 even Congress recognizes the effect on commerce that  
17 drug trafficking has.

18 And in this case, specifically as to  
19 Mr. Garcia, there is evidence that he, himself, was  
20 involved in narcotics activity. And so in this case  
21 we have an example of not only the enterprise itself  
22 engaged in commerce, but the defendant himself, not  
23 necessarily the victim, but that the defendant  
24 himself engaged in drug trafficking activity. So I  
25 think we're pretty solid on that.

1           The other examples the Court heard were  
2           that members traveled in commerce through interstate  
3           compacts. Their activities caused them to be moved  
4           out of state by the Corrections Department. There  
5           was travel. There is also sending narcotics through  
6           commerce. Gerald Archuleta is an example of someone  
7           who received drugs in Tennessee from New Mexico.

8           So I think, even if you look at the Garcia  
9           case, really what we have here is the judge in  
10          Garcia, or the court in Garcia, alleging that the  
11          enterprise's effect on commerce was pretty thin. In  
12          this case we have much more evidence than that.

13          THE COURT: Well, are you not excited about  
14          defending my theory on the case that I just don't  
15          think that you can get an as applied challenge: One  
16          defendant can't raise it; it's got to go to the  
17          entire statute or none at all?

18          MR. CASTELLANO: I actually do like that  
19          theory. I can't say I thoroughly investigated that  
20          theory by the Court. But it seems to me that's the  
21          way the statute is written.

22          And I cited also to the -- I believe the  
23          Torres case on page 3 of my opinion. And even in  
24          Torres, after addressing the facial challenge, the  
25          statute indicates what the Court has addressed, and

1 it says, "Specifically, Section 1959 prohibits the  
2 commission of a violent crime as consideration for  
3 the receipt of, or as consideration for a promise or  
4 agreement to pay anything of pecuniary value from the  
5 enterprise engaged in racketeering activity." And  
6 then enterprise as an entity is an enterprise that  
7 engages in activity.

8 So I actually do like the Court's theory.  
9 I don't know much more about it. But it makes sense  
10 to me that you can't take a piecemeal approach to a  
11 gang that is in -- by itself, engaged in racketeering  
12 activity, and try to isolate that particular member  
13 and say: Government, you must prove that this person  
14 himself did.

15 But I think, even if that were the case,  
16 Mr. Garcia himself was engaged in activity. So the  
17 Court's opinion aside, which I do like, I think we  
18 could prove it even if there was an applied -- as  
19 applied challenge specifically to the defendant.

20 But I like the Court's reasoning,  
21 certainly.

22 THE COURT: All right. Anything else,  
23 Mr. Castellano?

24 MR. CASTELLANO: No, sir.

25 THE COURT: Thank you, Mr. Castellano.

1           Mr. Davidson, do you have anything further  
2     on your motion?

3           MR. DAVIDSON: Your Honor, one of the  
4     arguments relied upon by the Government is the fact  
5     that Congress in the statute found an interstate  
6     connection. But the U.S. Supreme Court noted in  
7     Morrison that the question whether interstate  
8     activity affects interstate commerce sufficiently to  
9     come under the commerce clause power is a judicial  
10    determination. Congress can't just evade judicial  
11    review by the judiciary by just putting whatever it  
12    wants to in the statute.

13           Now, the reason that sometimes that gets  
14    noted that Congress made that finding was because one  
15    of the problems in the Lopez case, the Gun-free  
16    School Zones Act, was that Congress had made no  
17    jurisdictional -- they had made no findings of any  
18    connection to interstate commerce.

19           But our claim is not that gang activity  
20    that involves drug trafficking doesn't have an  
21    interstate commerce element. Our claim is that the  
22    evidence that was produced at trial regarding the  
23    murder of Freddie Sanchez and my client's involvement  
24    in it, again construing evidence in the light most  
25    favorable to the verdict (sic), even when you do

1 that, you still don't get a connection to interstate  
2 commerce. You have to pile inferences upon  
3 inferences in ways that the U.S. Supreme Court has  
4 said are forbidden if we are going to maintain a  
5 federal system of government, where you have states  
6 which have traditional police power to regulate crime  
7 and things of that nature.

8 With respect to the point that, in the  
9 Garcia case out of the Eastern District of Michigan,  
10 that that particular gang activity -- the activity of  
11 that gang may have had a weak connection to  
12 interstate commerce, that doesn't suffice to  
13 distinguish that case from our case. Because the  
14 analysis of the judge there was that the Government  
15 needs to show a substantial connection between the  
16 individual conduct and the interstate commerce.

17 This is what the court said about that:  
18 "VICAR has no jurisdiction element which ties either  
19 the violent act or the conduct of the defendant to  
20 interstate commerce."

21 And that's unlike RICO. For instance, in  
22 the RICO statute, RICO says, Section 1962(c), "It  
23 shall be unlawful for any person employed by or  
24 associated with any enterprise engaged in, or the  
25 activities which affect interstate or foreign

1 commerce, to conduct or participate directly or  
2 indirectly in the conduct of such enterprise's  
3 affairs through a pattern of racketeering and  
4 collection of unlawful debt." That express  
5 connection to interstate activity of the individual's  
6 conduct is not in the VICAR statute. What VICAR  
7 says, in Section 1959(a)(1) is, "Whoever has  
8 consideration for the receipt of, or as consideration  
9 for promise or agreement to pay anything of pecuniary  
10 value from an enterprise engaged in racketeering  
11 activity, or for the purpose of gaining entrance, or  
12 to maintain or increase position in an enterprise  
13 engaged in racketeering activity, where" -- et  
14 cetera, "commits assault resulting in serious bodily  
15 injury upon, or threatens to commit a crime of  
16 violence against any individual" --

17 THE COURT: You're reading from the Garcia  
18 case?

19 MR. DAVIDSON: This is from Section  
20 1959(a)(1), correct.

21 The point is that the VICAR statute doesn't  
22 have the close tie to interstate commerce that RICO  
23 has, which is why all the RICO cases cited by the  
24 Government are easily distinguishable. The problem  
25 under VICAR, is that it criminalizes activity that



1 has the intent of maintaining or increasing position  
2 of a gang. But as the court in Garcia noted, the  
3 statute itself doesn't have a connection to --  
4 doesn't require a connection to individual -- doesn't  
5 require in the statute a connection between the acts  
6 of the individual and interstate commerce.

7 So what you have happening is it allows you  
8 in a way that's unconstitutional to criminalize a  
9 purely state activity that's criminal in nature,  
10 without there being a sufficient interstate commerce  
11 connection.

12 So for these reasons, Your Honor, as  
13 applied challenges under the Commerce Clause are  
14 definitely allowed. And I'd be happy to provide  
15 further briefing to the Court on that element. It  
16 seemed in the research that I did in preparing for  
17 today's argument that I didn't find any cases that  
18 stood for the proposition that you can't bring an as  
19 applied Commerce Clause challenge to VICAR. The  
20 cases that had a de minimis requirement were cases  
21 where the statute already regulated economic  
22 activity, which of course this statute doesn't.

23 If there are no further questions, that's  
24 all I have.

25 THE COURT: All right. Thank you,

1 Mr. Davidson.

2 Any other defendant want to speak on this  
3 issue?

4 Ms. Jacks.

5 MS. JACKS: Your Honor, I never understood  
6 this issue until this morning. And I join the  
7 arguments on it. We had not joined, and I'd ask the  
8 Court's permission to join Mr. Davidson's motion on  
9 behalf of Mr. Sanchez.

10 MR. LOWRY: Same for Mr. Baca.

11 MS. BHALLA: Same for Mr. Herrera as well,  
12 Your Honor.

13 THE COURT: You know, on the people who had  
14 drug connections early on, I thought about it one  
15 night and I didn't see that. I think that's pretty  
16 tough for the defendants that -- where they -- where  
17 the Government went to the theory on the drug issue.  
18 The one that I thought was intriguing was the  
19 defendants' that only -- the Government was going to  
20 the jury on the theory that they were advancing their  
21 position within the organization. So I think it's a  
22 really tough hold to try to make the argument on  
23 drugs.

24 But I think it's an interesting issue on  
25 those that are only committing a crime to advance

1 their position in the organization.

2 I guess my thoughts are that I've probably  
3 done the best I can on this. It's going up to the  
4 Tenth Circuit in this case one way or another,  
5 whether I set aside Mr. Garcia's conviction, or I  
6 leave it in place. And I think I probably thought  
7 about it, and I will think about it again. I'll take  
8 it as a motion to reconsider the opinion I got out in  
9 August. But I did take it back to Albuquerque, gave  
10 it a little bit more thought, and came up with that  
11 theory.

12 I could be wrong. It could be that they  
13 can raise these issues. And even if you can raise  
14 them, then you've got the issue of whether there is a  
15 de minimis or lack of substantial impact on  
16 interstate commerce. But I'm still somewhat -- maybe  
17 I persuaded myself on this issue. But I'm not  
18 inclined to run away from it right at the moment.  
19 But I'll take a look at it, and look at this district  
20 judge's opinion and see.

21 But I'm inclined to deny the motion, just  
22 leave it in place, and let the Tenth Circuit deal  
23 with it. Because it's not really a new trial issue.  
24 It's more of a legal issue, that we have a nice  
25 robust record for them to look at. If they're going

1 to decide this issue, this might be a good one for  
2 them to decide it, rather than me not giving them an  
3 opportunity, or me saying something that really  
4 doesn't make any difference, because it's probably an  
5 issue for the appellate courts.

6 MR. DAVIDSON: Your Honor, could I speak to  
7 that briefly?

8 THE COURT: You may.

9 MR. DAVIDSON: It's my understanding -- and  
10 my colleagues at the U.S. Attorney's Office can  
11 correct me if I'm wrong -- but if you were to rule in  
12 favor of my client, there may not be an appeal,  
13 because it would have to be -- it would have to go  
14 through the Solicitor General's Office to approve an  
15 appeal by the Government, and oftentimes, I  
16 understand the Solicitor General's Office would  
17 reject that application, so they might not actually  
18 have an appeal if you rule in our favor. Whereas, if  
19 you rule in their favor, you will have an appeal.

20 THE COURT: Seems like they've got my name  
21 on the wall this year, because I sure am getting a  
22 lot of appeals from the Government. So it may help  
23 you if I just leave it in place rather than setting  
24 it aside. But in any case, I'll take a look at it.

25 MR. DAVIDSON: Thank you.

1 THE COURT: All right. So let's go to  
2 Andrew Gallegos' motion for a new trial. Ms.  
3 Torraco, are you going to argue this motion?

4 MS. TORRACO: Yes, Your Honor.

5 THE COURT: Ms. Torraco.

6 MS. TORRACO: What exhibit number are we  
7 on?

8 THE COURT: Well, for your motion we're  
9 going to start over. So if you have exhibits, let's  
10 start with A, for purposes of Mr. Andrew Gallegos'  
11 motion.

12 MS. TORRACO: I believe the Government is  
13 going to stipulate to the admission of Exhibit A,  
14 which is a trial transcript from Morgan Ramirez.

15 MS. ARMIJO: No objection, Your Honor.

16 THE COURT: All right. Any objection from  
17 anyone else? All right. Andrew Gallegos' Exhibit A  
18 for purposes of his motion for new trial is admitted  
19 into evidence.

20 (Defendant A. Gallegos Exhibit A admitted.)

21 MS. TORRACO: And I have a hard copy, if  
22 the Court would like that.

23 THE COURT: I would. Thank you.

24 MS. TORRACO: And as Exhibit B, I believe  
25 the Government will also stipulate to the admission

1 of a partial transcript of Richard Williamson. And I  
2 have given the Government hard copies of each of  
3 these exhibits.

4 THE COURT: All right. Any objection?

5 MS. ARMIJO: No, Your Honor.

6 THE COURT: Any objection from any other  
7 defendant? Not hearing or seeing any, Andrew  
8 Gallegos' Exhibit B will be admitted into evidence  
9 for purposes of his new trial motion.

10 (Defendant A. Gallegos Exhibit B admitted.)

11 MS. TORRACO: Thank you, Your Honor. And I  
12 have a hard copy for the Court as well.

13 THE COURT: I would like that.

14 MS. TORRACO: May it please the Court.

15 THE COURT: Ms. Torraco.

16 MS. TORRACO: I have repeatedly heard from  
17 the Government that the Court has ruled on severance.  
18 But hindsight is 20/20. And in reviewing a lot of  
19 the evidence, and especially the statements and the  
20 testimony given by Morgan Ramirez, I believe that the  
21 Court will want to take another look at the  
22 statements made by Morgan Ramirez that came in. And  
23 we believe that they came in as a violation of United  
24 States v. Bruton.

25 And in doing my research in preparing for

1 oral argument today, I did come across an important  
2 case for the Court, which is Lilly versus Virginia.  
3 And in Lilly versus Virginia -- I can give the Court  
4 the cite to that case, if you do not have it.

5 THE COURT: Go ahead and put it on the  
6 record.

7 MS. TORRACO: That's 483 U.S. 171. It's a  
8 1999 decision. The court in Lilly versus Virginia  
9 says, "Even if the trial court finds that a statement  
10 falls within a hearsay statement, that does not mean  
11 that that particular statement can still be admitted  
12 against a co-defendant."

13 And so what I would like to do is go  
14 through some of the statements that were admitted.

15 Now, I would like to refresh the Court's  
16 memory. What happened in this case is, we  
17 received --

18 THE COURT: But isn't that case -- I mean,  
19 that was a confrontational -- I mean, isn't the law  
20 just totally different after Crawford and after  
21 Small? I mean, we just can't even rely on it, can  
22 we?

23 MS. TORRACO: Well, I think Crawford  
24 completely supports the position that I'm going to  
25 assert today, which is that, even if a statement is

1 found to fall into a hearsay exception, it still  
2 doesn't.

3 THE COURT: But isn't the problems with  
4 your statements, they're just not testimonial?  
5 You're struggling with statements that were not  
6 testimonial. And that's the problem that you have  
7 with those statements. And they're just -- they just  
8 fall outside of the Confrontation Clause today  
9 because of that.

10 MS. TORRACO: No, because -- okay, the  
11 statements that Morgan Ramirez made on the stand, for  
12 example --

13 THE COURT: But once she's on that stand,  
14 the Confrontation Clause is out the door.

15 MS. TORRACO: No, because she said "Joe  
16 said." So her testimony was everything that Joe  
17 Gallegos had told her. So the confrontation that  
18 we're missing --

19 THE COURT: But how is she -- how is  
20 anything that Joe Gallegos said to her testimonial?  
21 I mean, she was not preparing for trial. She wasn't  
22 taking those statements as a police officer. Those  
23 were not made in anticipation of a VICAR trial. It a  
24 seems to me they just do not fit any definition of a  
25 testimonial statement.



1 MS. TORRACO: Under Lilly versus Virginia,  
2 or just in general? Because my client does have the  
3 right to --

4 THE COURT: Well, in 2018, given the  
5 development of the Confrontation Clause, it just  
6 doesn't fit any definition. They weren't even using  
7 the words "testimonial" back in 1999.

8 MS. TORRACO: Right.

9 THE COURT: So it's just not going to work  
10 any longer, that case, is it?

11 MS. TORRACO: I hear what the Court is  
12 saying.

13 Let me back up and start over. Morgan  
14 Ramirez made several statements on the stand that  
15 were used against Andrew Gallegos. She made  
16 statements that Joe Gallegos had told her certain  
17 things. My client is denied the Sixth Amendment  
18 confrontation right to confront Joe about those  
19 statements and to test their veracity. So when  
20 Morgan Ramirez says things like, "Joe Gallegos told  
21 me that he shot Adrian Burns," Andrew Gallegos was  
22 denied the right to cross-examine Joe Gallegos on  
23 that statement.

24 THE COURT: And didn't I give a limiting  
25 instruction on that under the hearsay rules?

1 MS. TORRACO: In some cases, yes, you gave  
2 a limiting instruction.

3 THE COURT: When requested, I gave it.

4 MS. TORRACO: Yes.

5 THE COURT: And so, if it falls outside of  
6 the Bruton problem and outside of the testimonial,  
7 and just falls under the rules of hearsay, then I  
8 think the Small case and others indicate that  
9 limiting instructions can be enough. So it doesn't  
10 violate the Constitution.

11 MS. TORRACO: Some statements did not get  
12 limiting instructions, and some statements I have a  
13 concern that the limiting instruction was  
14 insufficient. And if the Court will just indulge me,  
15 I would like to go through a few of those statements.  
16 And it sounds like you have a good grasp and memory  
17 of what happened, probably better than I do.

18 But, as I recall, we went up to the bench.  
19 We had a bench conference and discussed when these  
20 limiting statements would come in, when they apply,  
21 and when they don't apply.

22 My concern is that there is a couple of  
23 statements that did not get limiting instructions.  
24 When we alerted the Court that the 302 just came out  
25 that morning on Morgan Ramirez, and we approached the

1 bench, and I explained to the Court that I was really  
2 concerned because we had just received that  
3 information, and Ms. Ramirez was on the stand. And  
4 we asked the Government at the bench conference what  
5 were the statements that were going to be coming in  
6 from Morgan Ramirez. And the statements, as we  
7 understood, were different, as it turns out, than  
8 what Ms. Ramirez actually said. So when she got on  
9 the stand, she actually gave a statement saying that  
10 Joe Gallegos told her that he put a bag over Adrian  
11 Burns' head; that he shot him at the house; that the  
12 bullet got stuck in his ear; that he put a bag over  
13 his head, and then proceeded to burn him in the car.

14 That was not in the 302, and so that was  
15 not discussed at the bench conference as to whether  
16 or not you were going to give a limiting instruction.  
17 So that statement came in without a limiting  
18 instruction, and therefore, it was applied to Andrew  
19 Gallegos. My understanding is that sometimes  
20 statements can come in without limiting instructions,  
21 if there is harmless error. But I don't see that a  
22 statement like that, because it's so damaging, that  
23 it indeed was harmless error.

24 THE COURT: Well, two thoughts on that  
25 particular one: B, did you request a limiting

1 instruction, and was it denied?

2 MS. TORRACO: I requested a limiting  
3 instruction as to all the statements at the bench.  
4 At the time that the statement came out, another  
5 statement came out, and then I requested the limiting  
6 instruction. So a limiting instruction was not  
7 requested as to that specific statement.

8 THE COURT: And was Andrew Gallegos in any  
9 way mentioned in that testimony?

10 MS. TORRACO: Yes, because he said "they,"  
11 they put a bag over his head and they took him out  
12 to -- and they took him out and burned him. So I  
13 think it's plain error. And we can either say it's  
14 plain error because I didn't object, or we can say  
15 it's plain error because the statement shouldn't have  
16 come in against Andrew Gallegos. And I don't know  
17 which the Court follows. But the evidence against  
18 Andrew Gallegos was not overwhelmingly strong, absent  
19 this particular statement made by Joe Gallegos,  
20 supposedly, that Ramirez said that Joe Gallegos had  
21 made. Does the Court follow me?

22 THE COURT: I do. But what you're  
23 basically saying is this is a plain error?

24 MS. TORRACO: That's correct. So there  
25 were several statements made by Morgan Ramirez; some

1 that came in; some that had a limiting instruction.  
2 But because of this particular statement -- and if  
3 the Court will recall, there were actually two  
4 supposed confessions. The defense doesn't believe  
5 the confessions and doesn't believe that the  
6 testimony was true. But, nonetheless, there were two  
7 confessions. Taking them in the light most favorable  
8 to the state, one of the confessions was when Morgan  
9 Ramirez testifies and says that Joe had admitted  
10 shooting Adrian Burns; that they put a bag over his  
11 head, and they burned him.

12 The other confessional statement was when  
13 Billy Cordova testified and said that my client,  
14 Andrew Gallegos, had told him that he shot Adrian  
15 Burns, and that he and his brother had done it. And  
16 Billy Cordova assumed the brother was Joe Gallegos.  
17 So that was another statement that came in, and that  
18 one came in against Joe Gallegos without a limiting  
19 instruction. And I believe Joe Gallegos is joining  
20 in this part of the argument.

21 The reason that it's problematic is because  
22 the confessions are very different. If the Court  
23 will recall, Billy Cordova said that Adrian Burns was  
24 shot in the back of the head, which the evidence does  
25 not support. And Billy Cordova said that he was

1 burned inside the vehicle, which the evidence does  
2 not support.

3 The statements made by Morgan Ramirez,  
4 whether or not Joe Gallegos actually said this, are  
5 factually consistent with the evidence; that he was  
6 shot in the ear; that it didn't kill him; he was shot  
7 at the home; that they put a bag over his head, and  
8 then they took him out and burned him. That's why  
9 the statement by Morgan Ramirez is so damaging,  
10 because it was the only thing that was factually  
11 consistent.

12 Our argument is that, if indeed that  
13 statement had not come in, then the only  
14 confessional statement that Andrew Gallegos would  
15 have to deal with is the statement made by Billy  
16 Cordova, who I believe everyone in the courtroom has  
17 gone over and over and over about how discreditable  
18 Billy Cordova is.

19 So our first concern is that particular  
20 statement.

21 And what I would like to do, if the Court  
22 would indulge, is go over some of the other  
23 statements that came in that I am concerned about and  
24 that I do not believe are harmless error.

25 So if I may, Your Honor, when Morgan

1 testified to comments -- and this is going back to  
2 where I started from the beginning -- such as saying  
3 that Joe Gallegos shot Adrian Burns, that  
4 testimony -- that came in, and I did request a  
5 limiting instruction. And when it came in anyway  
6 without the limiting instruction, that is damaging to  
7 Andrew Gallegos' defense.

8 The other thing that I would like to  
9 address Your Honor, is the issue of the opposing  
10 defenses. And I think this is important in light of  
11 the fact that Mr. Troup's counsel, Mr. Burke,  
12 addressed the issue of being tried with the Adrian  
13 Burns murder. And, really, no one wanted to be tried  
14 with the Adrian Burns murder.

15 One of the problems that we had throughout  
16 the entire case is the conflicting defenses with the  
17 Adrian Burns Counts 4 and 5 for Andrew Gallegos, and  
18 the defense of the other members, the other  
19 defendants. Mr. Burke was very much a gentleman when  
20 he said: We don't want to be tried with Adrian Burns  
21 because of the horrific murder and all of the  
22 pictures.

23 The fact is that Andrew Gallegos had a  
24 conflicting defense as far as the other criminal  
25 defendants. And that conflicting defense started out

1 with the very first witness. And with that witness,  
2 the defense -- when I got up and cross-examined him,  
3 we made statements and questions to the effect that  
4 the SNM Gang was violent, the SNM Gang bragged about  
5 their accomplishments, bragged about the things that  
6 they did. We asked questions -- or I asked questions  
7 about the drug dealers, and that they were drug  
8 dealers and not users, in an attempt to try to  
9 establish that the behaviors of Andrew Gallegos were  
10 vastly different than the behaviors of the SNM  
11 members, trying to separate Mr. Andrew Gallegos from  
12 the SNM Gang. Because our defense has always been  
13 that he is not a member of the SNM Gang, nor was any  
14 of this accomplished or any -- or him being accused  
15 of anything to further or to gain admission to SNM.

16 This type of defense was in direct  
17 opposition, and actually hurt all of the other  
18 defendants. So I think, not only when Mr. Troup's  
19 counsel says that they don't want to be tried with  
20 Adrian Burns because of the horrific and grotesque  
21 nature of the murder, they don't want to be tried  
22 with Adrian Burns also because of the conflicting  
23 defenses that we had. I outlined most of that in our  
24 motion. But do I believe this is something that I  
25 didn't outline in the motion. And it caused conflict



1 because our position was very different than other  
2 positions, because there were certainly people who  
3 admitted that they were members of the gang.

4 The other thing that I want to bring the  
5 Court's attention to -- and I believe that Ms. Armijo  
6 does not object -- is that in her brief, the  
7 Government misstated something critical as to Andrew  
8 Gallegos, and that is that -- let me get that  
9 particular document. The Government stated that  
10 there was substantial evidence as to Andrew Gallegos  
11 as far as the VICAR conspiracy, and then as well as a  
12 motive for the murder. And they put in their brief  
13 that Andrew Gallegos stated that he knew that Adrian  
14 Burns was upset at him. And in fact, that was a  
15 misstatement. And if I may direct the Court's  
16 attention to page 12 of their Document 2450, and the  
17 bottom of page 11 of Document 2450, wherein they say  
18 that, "Andrew Gallegos stated that Burns was upset  
19 with him, if they owed him money." And, in fact,  
20 when we look at Exhibit B that I tendered to the  
21 Court, starting on page 40, the actual statement that  
22 was made by the witness is: "Andrew stated that he  
23 did not believe Adrian was upset with him, if he owed  
24 him money."

25 And the importance of that is because,

1 while I don't think that -- I like it best when you  
2 say that you're going to take a hard look at  
3 something. And I have a feeling that you're not  
4 going to say that you're going to take a hard look at  
5 this issue. But the reason that it's relevant is, if  
6 I can get you to say that you're going to take a hard  
7 look at this issue, then the inquiry is if there was  
8 a Bruton error, and statements did come in contrary  
9 to Bruton, and a limiting instruction was not  
10 requested, the next question is: Is was it harmless  
11 error? And that's why it's important to know that --  
12 a clarification on that statement, because Andrew  
13 Gallegos' statements to Williamson clearly gave no  
14 motive for Andrew Gallegos to participate in or  
15 commit the murder of Adrian Burns. And, therefore,  
16 we do not believe that the particular error was  
17 harmless.

18 THE COURT: Well, but harmless error  
19 applies to one in which, even if you're jumping up  
20 and down and screaming that I'm about to commit  
21 error, it can still apply, it can just be harmless  
22 error. But when we have plain error, the standard is  
23 much more difficult, isn't it, than just -- I mean,  
24 harmless error is always a doctrine out there. But  
25 isn't there another standard for the plain error?

1 MS. TORRACO: Yes, Your Honor. But I think  
2 that the standard for the plain error is the Bruton  
3 statement coming in, the statement coming in against  
4 Andrew Gallegos. That was the plain error.

5 And so then -- what I remember happening --  
6 I don't want this to come across like I'm saying  
7 that, you know, this was just -- it happened so fast.  
8 You know, we did this bench conference, and the Court  
9 clearly said: There is a lot here. We need to take  
10 this slow. And then the Court took a while, made  
11 some rulings on some of the statements, and at one  
12 point turned to the Government and said: We've got  
13 to take this slow. But it didn't go slow.

14 Morgan Ramirez was on the stand. You'll  
15 recall that she was upset. She was shaken. I said  
16 at the bench conference, I said that I thought she  
17 wasn't being truthful. But the Court commented, and  
18 said, no, it's because -- the Court thought it was  
19 because she was afraid of Joe Gallegos. But the  
20 statements were coming so fast. And she was saying  
21 things that were different than in the 302. The 302  
22 there is no statement, nor did we anticipate -- and I  
23 don't know if the Government anticipated the  
24 statement about "they" put a bag over Adrian Burns  
25 head and took him out and burned him. But that

1 statement kind of came out of nowhere, rambling on  
2 with her other statements about "Joe Gallegos said  
3 that he shot him." And for that reason, I think -- I  
4 don't even know how it happened, Your Honor, because  
5 I thought that I objected to every single statement  
6 that came out. And that was not one of the  
7 statements that we addressed at the bench. So I  
8 don't know how it happened, but it came out. And it  
9 was extremely damaging.

10 THE COURT: Well, she wasn't just sitting  
11 there reading a 302. She was being a live witness.  
12 They don't always testify like the 302 is written.

13 MS. TORRACO: No, she didn't.

14 THE COURT: Don't you like trial work?

15 MS. TORRACO: Yes, I love it, Your Honor.

16 THE COURT: Just all sorts of things  
17 happen, don't they?

18 MS. TORRACO: But I'm concerned about the  
19 Bruton argument.

20 THE COURT: Well, I'm not seeing a Bruton  
21 argument. I mean, it seems to me the best you got is  
22 a hearsay argument that more should have been done to  
23 give limiting instruction of hearsay. But what Joe  
24 Gallegos is saying to Morgan is -- I'm not seeing a  
25 Bruton problem.

1 MS. TORRACO: Well, Joe Gallegos said that  
2 "they," implying Andrew, put a bag over Adrian Burns'  
3 head and burned him.

4 THE COURT: But that's old -- that's old  
5 days. That's just not a confrontation problem. It's  
6 a hearsay problem. And maybe a limiting instruction  
7 should have been given. But it wouldn't have been  
8 under the Constitution. It would have been under the  
9 hearsay rules.

10 MS. TORRACO: So since I prefer trial work,  
11 and am not as eloquent in oral argument, Your Honor,  
12 would you allow me just to brief this for the Court?

13 THE COURT: Certainly.

14 MS. TORRACO: I have other cases that I'd  
15 like to cite for the Court as well, and I think I  
16 could do that better in writing.

17 THE COURT: Okay.

18 MS. TORRACO: Thank you very much.

19 THE COURT: Thank you, Ms. Torraco.

20 Anyone else want to join or have anything  
21 to say on Ms. Torraco's motion?

22 All right. Ms. Armijo, are you going to  
23 take this?

24 MS. ARMIJO: Yes, Your Honor, I guess I'm  
25 just confused. Is she going to submit a reply?

1 Because I believe that she had asked me before, and  
2 my position was that I would be opposed unless we  
3 just put it off. But if she is going to put  
4 something new in writing, then obviously we would  
5 like a surreply.

6 THE COURT: I don't think she has any  
7 problem with that. Do you, Ms. Torracco?

8 MS. TORRACO: No, Your Honor.

9 THE COURT: All right. So that's fine.  
10 Let's talk a little bit about scheduling.  
11 What do y'all want to do? Do you want to take a  
12 15-minute break and come in and keep going, or do you  
13 want to take our lunch break, as we did yesterday  
14 now, and come back at about a quarter till? What's  
15 your preference, Ms. Armijo?

16 MS. ARMIJO: I'd prefer that we just take a  
17 15-minute break and then keep going. Because I think  
18 that, after this, we only have one more motion left,  
19 and that, potentially, we could get done before  
20 lunch. Maybe I'm just being a little bit optimistic.

21 THE COURT: What's your thoughts, Ms.  
22 Harbour-Valdez?

23 MS. HARBOUR-VALDEZ: With the Court's  
24 permission, we did order lunch for our clients. And  
25 it is ready.

1 THE COURT: It is ready. Okay. Well,  
2 let's go ahead and just take our normal lunch break,  
3 and then we'll come back at about a quarter, ten  
4 till. We'll break then. All right. We'll be in  
5 recess for about an hour.

6 (The lunch recess was held.)

7 THE COURT: Is Mr. Castle going to be on?

8 MR. COOPER: I just texted him, told him we  
9 were getting ready to start so --

10 THE COURT: Well, I hate to ask everybody:  
11 Did you invite Mr. Acee to your pizza party? I'm  
12 sorry.

13 All right. Ms. Armijo, do you have  
14 response to Mr. Gallegos' motion for a new trial?

15 MS. ARMIJO: Well, I will say that we would  
16 not be here if it wasn't for a phone call that I  
17 received from Special Agent Acee back in March of  
18 2015. So I think you are right, Your Honor.

19 Your Honor, I talked to Ms. Torracco, and  
20 she indicated that her reply is actually going to  
21 contain her arguments. So I will be responding to  
22 her. And so, to save everybody's time, I think,  
23 unless the Court has specific questions, I will be  
24 replying in writing to her arguments, because I  
25 believe she's going to be making arguments -- and

1 I've checked with her -- not just supplementing with  
2 additional case law, but also arguing. So I will do  
3 that.

4 I will say she is correct, I did misquote  
5 in my response the statement, because initially, when  
6 I wrote it, I did not have the final transcript. And  
7 I looked at the real time transcript. And the  
8 real-time transcript gives a different view, it kind  
9 of -- it's rough, but it makes it seem like he said  
10 that he did know about it. And so that is why, when  
11 we got the real transcript in, we put it in. And I  
12 apologize to the Court that I didn't triple check it.  
13 So that is what happened with that.

14 So with that, Your Honor, since we are  
15 going to be doing this in writing, unless the Court  
16 has anything specific --

17 THE COURT: Well, let me ask you some sort  
18 of general questions. Are you agreeing with my  
19 analysis, it looked like most of the -- the handful  
20 of questions -- and it did seem to me a handful of  
21 questions -- that Mr. Andrew Gallegos was relying on  
22 for his motion for new trial were not testimonial  
23 statements? They fell into the category of wrestling  
24 with hearsay. And was there anything in there that  
25 you thought there was -- error occurred?



1 MS. ARMIJO: No, Your Honor. We agree with  
2 your analysis. And I have even pointed out in the  
3 transcript, because you asked the specific question  
4 about whether or not they asked for a limiting  
5 instruction. And on the transcript, on page 24 is  
6 where the questions start about what Ms. Ramirez says  
7 that Joe Gallegos told her. And there is a series of  
8 about five questions that she answers. And then it's  
9 at that point that Ms. Torracco says, "Is Mr. Gallegos  
10 entitled to a limiting instruction on that  
11 statement?"

12 THE COURT: And what did I say?

13 MS. ARMIJO: And you said yes. The last  
14 statement is --

15 THE COURT: So I did give one on that?

16 MS. ARMIJO: Yeah. So the questioning  
17 starts on 24, at the bottom. And this is where she  
18 says -- she being Ms. Ramirez -- "He told me one day,  
19 I don't remember the exact words, if he said we shot  
20 Mr. -- or shot Babylon, or if it was -- I don't  
21 remember his exact words to be honest."

22 And then she goes on to say, "He said it's  
23 crazy that -- that the bone in your ear could stop a  
24 bullet. I don't really know what he was talking  
25 about at that time."

1           And then she goes on to say, "It came up in  
2 another conversation that he was saying that when  
3 Adrian Burns got shot, that the bullet got stopped by  
4 a bone in the ear."

5           Then Ms. Ramirez -- there is more questions  
6 by Mr. Beck. And then she says, "He did say that he  
7 got shot in the ear. He said, like, they shot him, I  
8 guess trying to shoot -- shoot him in the head,  
9 basically, but it got stopped by the bullet in his  
10 ear -- I mean, by the bone in his ear."

11           And then the answer -- the question that  
12 she then asked for a limiting instruction is: "Where  
13 did Joe Lawrence Gallegos tell you that Babylon was  
14 shot?"

15           And she says, "Like where in place wise?"

16           "Right."

17           "Somewhere in his house, he -- I don't  
18 know, I asked him a question one day, kind of joking,  
19 but really not, about the room that was, like, added  
20 onto his house, because it was like a closet, and  
21 used to creep me out a lot. So like we were talking  
22 about it. And he told me, 'Don't worry, no one has  
23 actually died in here. Someone may have been shot in  
24 here, but they didn't die.'"

25           And that's the part where she initially

1 asked for a limiting instruction. And I believe  
2 there is more limiting instructions later on. But  
3 that's the part where there is a series of four  
4 questions. And then I think on the fifth one is  
5 where she requests the limiting instruction.

6 And yes, Your Honor, to answer you, we do  
7 agree with your analysis. We agreed with your  
8 analysis back then, and we agree with your analysis  
9 today.

10 THE COURT: So you're not seeing, in  
11 looking at that, that there is anything that you're  
12 going to tell the Tenth is error?

13 MS. ARMIJO: No.

14 THE COURT: And then if it is error, you're  
15 going to argue it's harmless? Is that --

16 MS. ARMIJO: No. We're not seeing any  
17 error.

18 THE COURT: No error at the present time?

19 MS. ARMIJO: No error. I agree, we --

20 THE COURT: Was a limiting instruction  
21 given each time it was requested? I don't remember  
22 turning one down here at the bench when we were going  
23 back and forth, but --

24 MS. ARMIJO: I don't remember you ever  
25 turning one down either.

1 THE COURT: I didn't think the Government  
2 objected to any limiting instruction as to Andrew  
3 Gallegos. I don't recall any.

4 There were some at other points in the  
5 trial where there was state of mind, and I allowed it  
6 to come in as to everyone. But on --

7 MS. ARMIJO: There is one here where -- on  
8 page 35 -- where -- I think we're up at the bench,  
9 where you say, "I'm not going to give a limiting  
10 instruction on this. Just ask it. I don't think  
11 it's hearsay."

12 THE COURT: And what was that related to?

13 MS. ARMIJO: Let me go back there. That  
14 was when -- I think it's the Adrian Burns statement,  
15 like, Yeah, he really does burn. And that was the  
16 statement that Joe Gallegos made about, you know, the  
17 pun on his last name. And I think that on that  
18 occasion --

19 THE COURT: Well, that can hardly be  
20 offered for the truth of the matter.

21 MS. ARMIJO: And so I think you went into  
22 analysis for that. But that's the only one that I  
23 see, as I'm going through. But anything that you  
24 would have denied -- I think you did an analysis and  
25 you spent some time going through the statements,

1 so --

2 THE COURT: Yeah, I think my memory is I  
3 did a little James opinion on that one, on the  
4 statements that were going to come in against  
5 Mr. Andrew Gallegos.

6 MS. ARMIJO: Correct.

7 THE COURT: All right. Anything further on  
8 this motion?

9 MS. ARMIJO: No, Your Honor. Thank you.

10 THE COURT: Any other defendant have any  
11 responses before I hear from Ms. Torraco?

12 All right. Ms. Torraco, do you have  
13 anything further on your motion?

14 MS. TORRACO: No, Your Honor. Thank you.

15 THE COURT: Well, I'll take a look at it  
16 and I'll go through, and I'll wait for your reply and  
17 maybe the Government's surreply. But I don't  
18 think -- and I didn't think at the time -- there was  
19 any confrontation problem. We just had to be careful  
20 with the rules of hearsay. And I thought we handled  
21 those with, my instructions well. You know, I made a  
22 decision pretrial that if I were going to try people  
23 together, I could rely on limiting instructions. And  
24 we'll see if that holds up at the Tenth. I assume  
25 that's going to be an issue that somebody might raise

1 with them. And if they do, that's something that  
2 they'll have to wrestle with. But I think, given the  
3 structure that I put in place going into trial, I  
4 think it worked pretty well for your clients. I'll  
5 take a look at it. But I'm inclined to deny the  
6 motion, at least on a review that we've done so far.

7 All right. Let's see, we now go to -- was  
8 that motion 8? So I'm going to motion 9, which is --

9 THE CLERK: No, that was 9. I think that  
10 was Andrew Gallegos'.

11 THE COURT: Was that motion 9. Did we  
12 cover the Gallegos' joint motion? Did we skip one?

13 MR. BENJAMIN: Yes, Your Honor.

14 THE COURT: Okay. I'm sorry, so we need to  
15 take --

16 MR. BENJAMIN: And I don't know if we  
17 skipped it, Your Honor, because I don't know what the  
18 final order was.

19 THE CLERK: It was just out of order.

20 THE COURT: I did take it out of order.  
21 And I apologize.

22 THE CLERK: It's number 8.

23 THE COURT: I think the Gallegoses together  
24 had the joint motion, which is 8, which you're about  
25 to argue, which I think puts you up to 9 for Andrew

1 Gallegos'.

2 All right. Mr. Benjamin.

3 MR. BENJAMIN: If it makes the Court feel  
4 better, Your Honor, I think there was error in this.

5  
6 THE COURT: In the what?

7 MR. BENJAMIN: I was just responding to the  
8 Court's last question.

9 Your Honor, my reply for Counts 4 and 5 --  
10 and that is what the Court noted is a joint motion,  
11 was Document 2467, the Government's, their response  
12 was 2452, and my original motion was Doc 2415. And I  
13 think I probably did that backwards. I apologize.

14 And their response, I thought was extremely  
15 interesting, Your Honor, because their response --  
16 and I made a chart out of this -- had a statement  
17 that could only have been offered for the truth, and  
18 then a statement that was not offered for the truth.  
19 And that statement is cut out of the testimony -- was  
20 uniquely, not word for word -- but it was the same  
21 statement. It's the statement that was, for lack of  
22 a better term led -- Ms. Amber Sutton was led on --  
23 and it was to tell Joe Gallegos to quit being a bitch  
24 and pay his debt, or to tell Joe Gallegos if he  
25 doesn't have my money to stop being a bitch and give

1 me a call. And that statement, I think, fulfills  
2 what the Court said -- or doesn't fulfill what the  
3 Court said the Government was going to have to do in  
4 Document 1950, which was, at the end of the week of  
5 hearings before trial, in March of 2018, that the  
6 Government was going to have to prove that for -- one  
7 of two things -- the second one is what they were  
8 going to try and prove, the purpose of gaining or  
9 increasing membership in the SNM, some evidence from  
10 which the jury could find that this was done on  
11 behalf of the SNM.

12 And I need to go back to May 10, 2017. And  
13 that was our omnibus hearings, where I was requesting  
14 a copy of the transcripts for Counts 4 and 5. And  
15 that started with me guessing as to what they were  
16 going to show. And not ever being told that, but  
17 ultimately ending with a promise by the Government  
18 that: We're going to show something. The Court may  
19 remember that was where I started with -- there was a  
20 statement that had been produced early on that Roy  
21 Martinez talked about Joe Gallegos killing Adrian  
22 Burns on a wire, essentially on a wiretapped  
23 conversation. That was retracted by the Government  
24 March 9th of 2017. And just for the record, in  
25 Document 21822. But we never got any further



1 clarification on how we were going to do this. And  
2 the Government, Ms. Armijo in that motions hearing  
3 said: We're going to do it, we're going to do it.

4 And we didn't find out until April 3, 2018,  
5 that Amber Sutton was going to parrot a statement  
6 that she supposedly overheard Daniel Orndorf told by  
7 Adrian Burns. And this is the statement that  
8 occurred at Walmart. The tell Joe to stop being a  
9 bitch and call me statement that was referenced in my  
10 motion, their response, and my reply.

11 And that -- I think there is multiple  
12 arguments. The first of which is the Court did  
13 provide a limiting instruction. And so we're there.  
14 But I don't think that suffices for several reasons.  
15 The first being that a statement can't be offered for  
16 the truth and not offered for the truth at the same  
17 time. And that's exactly what the Government  
18 outlines in its response that statement was for. If  
19 it was offered to prove disrespect, as is in the very  
20 beginning portion of their motion, Document 2452,  
21 page 6, showing that Joe Gallegos was disrespected,  
22 and therefore, was doing this on behalf of the SNM,  
23 that's being offered for the truth. That's the only  
24 thing that can be offered for, is that Joe was  
25 disrespected. There is not any way that that can't

1 be.

2 And so this is different than, essentially,  
3 what the Court analyzed in Skyline Potato versus  
4 Highland Potato, 2013 Westlaw 311846, where "The  
5 testimony is not hearsay when it's offered only to  
6 prove that the statement was made."

7 This wasn't offered to prove that Adrian  
8 had a statement with Daniel. This was offered to  
9 show that Joe Gallegos was being disrespected by  
10 Adrian Burns. And so Amber Sutton's parroting of  
11 Adrian Burns' statement that was made to Daniel  
12 Orndorff required the content or the truth of the  
13 matter, which was the disrespect. That was objected  
14 to. We had a long conference at the bench, and  
15 actually there was a motion in limine prior to that  
16 even starting, and the Court provided a limiting  
17 instruction. And Mr. Castellano came back and said,  
18 Well, it's not hearsay because it's a command.

19 I don't think -- I objected at the time. I  
20 think the transcript reflects that. And I don't  
21 think that holds true, even after the long review  
22 that I've done of this. Because the command, if any,  
23 was directed at Daniel Orndorf. It was not directed  
24 at Joe Gallegos. The disrespect is what the  
25 Government all along has said was directed at

1 Mr. Gallegos. So it's not a command, or the only  
2 command could have been "call me." It was the  
3 disrespect portion, which was "stop being a bitch,"  
4 which I think is an insult, disrespect, or anything  
5 else.

6 THE COURT: But how can that be hearsay? I  
7 mean, that --

8 MR. BENJAMIN: It's an out-of-court  
9 statement to prove that Joe Gallegos is being a  
10 bitch, Your Honor, respectfully. That's the only way  
11 that I think that comes in. It's disrespectful. And  
12 that's what the Government relied on; that that  
13 statement has to carry some weight. I hope I'm  
14 making sense, Your Honor. But that's the idea that,  
15 if that statement is meaningless, there is no  
16 evidence of the SNM increasing or maintaining  
17 membership. If that statement carries weight, and is  
18 disrespect, then it has to be for the truth of the  
19 matter.

20 So I don't think that that statement is a  
21 command under U.S. v. Oguns, 921 F.2d 442. I don't  
22 think this is new case law. I think this is the case  
23 law that we were talking about. Specifically, in  
24 that case, Your Honor, they were talking about  
25 hearsay and nonhearsay statements. They were a drug

1 conspiracy case: Individual calls the residence and  
2 the agent picks up the phone and the question is:  
3 "Have the apples arrived?" Well, that was offered  
4 for circumstantial evidence that they were trying to  
5 have coded transactions. But this is not what we're  
6 doing with the statement of "stop being a bitch."  
7 That is content-necessary. And so the call regarding  
8 the apples, whether it's a question, a statement, or  
9 a declaration, or different words that the Court  
10 used, is solely the existence of an act.

11 What's important here is the interaction  
12 that Adrian Burns had at Walmart with Daniel Orndorf,  
13 who, as the Court will recall, was not called to  
14 testify -- and I think the Government represented  
15 that he was wanted was the main reason. But that  
16 interaction at Walmart between Adrian and Daniel is  
17 content-necessary.

18 And so, I think that two things: One, the  
19 statement can't be both hearsay and nonhearsay. But,  
20 two, after reviewing this, Your Honor, I think I have  
21 to stand by the confrontation request, which is that  
22 statement, the admission of that statement prevented  
23 me from confronting Adrian Burns on that statement  
24 that goes to the heart of the matter.

25 And I think that the Government -- and they

1 can disagree with me, Your Honor -- but their  
2 response doesn't show that there was any other  
3 statement that linked that VICAR murder to a federal  
4 jurisdiction. And the Court provided a long,  
5 detailed opinion in Document 1950 right before trial.  
6 But I don't think they got there, Your Honor. And  
7 so, respectfully --

8 THE COURT: Got there on the nexus?

9 MR. BENJAMIN: Correct.

10 And one of the things I pointed out is some  
11 of the statements, for instance, that Ms. Torraco is  
12 having issues with I think are very prejudicial.  
13 They don't help the Government at all. The fact that  
14 Morgan may have testified that Joe said that he shot  
15 somebody in the head, that doesn't help them at all  
16 on this question of whether or not that is a VICAR  
17 murder. That goes to whether or not there is a  
18 murder. But there is no nexus in the statement, "I  
19 shot Adrian Burns" or "Adrian Burns really does  
20 burn," or the statement that was brought up about  
21 Andrew and Billy Cordova. None of those  
22 statements -- and I said that in my reply, Your  
23 Honor -- connect this to the SNM or any -- in the  
24 Court's word, "nexus."

25 So I do feel like the Court was correct,

1 I'm essentially arguing to a court of appeals, I  
2 think, but the Court made its ruling, and I'm asking  
3 it to review that.

4 THE COURT: Isn't your argument on nexus  
5 ultimately a sufficiency of the evidence on this  
6 particular point, it's a sufficiency of the evidence?  
7 I gave a pretrial ruling and I said: Here's the  
8 line. You've got to get it across, Government. And  
9 so the question is the more that the Government is  
10 pointing to, is that sufficient evidence? Isn't it  
11 kind of a sufficiency of the evidence?

12 MR. BENJAMIN: No, Your Honor, not at all,  
13 because the line -- it's 4th and inches, and the  
14 Government had to get the ball across the line. And  
15 the Government says that the statement that comes in,  
16 "tell Joe to stop being a bitch and call me," that is  
17 the only thing, for lack of a better term, we get  
18 into a rule that I've never understood which is, I  
19 think it's any part of the football, but much of the  
20 football needs to get across that line.

21 And so that's where we're at. This is the  
22 only statement that does that, or comes close to  
23 doing that.

24 So no, Your Honor, I disagree with  
25 sufficiency. I think this is either in or out. And

1 it's either done or not done.

2 THE COURT: All right. Anything else on  
3 your motion, Mr. Benjamin?

4 MR. BENJAMIN: No, Your Honor.

5 THE COURT: All right. Thank you,  
6 Mr. Benjamin.

7 Anybody else want to argue in support?

8 Ms. Torraco.

9 MS. TORRACO: I don't want to argue, Your  
10 Honor, but I want to bring the Court's attention that  
11 we joined in writing on this motion.

12 THE COURT: All right. Anyone else have  
13 anything on the defense side to say on this issue?

14 All right. Mr. Armijo.

15 MS. ARMIJO: Your Honor, I'm going to put  
16 up on the Elmo -- and I'm referring to -- I believe  
17 it was Ms. Torraco's exhibit from the last one --  
18 it's Morgan Ramirez's testimony. And this is why you  
19 can't just take one statement at point. Because the  
20 statement about "tell him to" --

21 MR. BENJAMIN: What page?

22 MS. ARMIJO: I'm on 28 of the transcript.

23 THE COURT: Tell him to call me, right?

24 MS. ARMIJO: Yeah, where he said, "Tell him  
25 to quit being a bitch and to call me." That

1 statement. It's not being offered to show whether or  
2 not Joe Gallegos is a bitch or not.

3 THE COURT: Well, that's the problem I'm  
4 having with it being a hearsay statement.

5 MS. ARMIJO: And Daniel Orndorf could have  
6 said: Tell Joe Gallegos to quit being a little girl.  
7 We're not offering that to prove that he's a little  
8 girl. I mean, clearly he's a man. So we were not  
9 offering it to show that he was a bitch. We were  
10 offering it to show the impact that it had on him.

11 And how we know that it had an impact on  
12 him is where Morgan Ramirez testified that he told  
13 her, "Because motherfuckers with big mouths, that's  
14 what happened. That he didn't get robbed and that he  
15 died with all of his money." And so that is  
16 something that we used into showing that.

17 And then it goes on talking about that.  
18 But that's why that statement is important, because  
19 we have -- the statement about him being a little  
20 bitch was offered to show, one, it was a command, and  
21 two, the impact that it had on Joe Gallegos. It  
22 provides a motive for the murder. And we see that  
23 years later when he tells Morgan Ramirez that it  
24 wasn't a robbery; that at least for his motive it was  
25 "because motherfuckers with big mouths and that's



1     what happens." And so we do have the connection  
2     there.

3             I know that I do agree with the Court that  
4     I think the argument that Mr. Benjamin is trying to  
5     make is a sufficiency --

6             THE COURT: What you're saying is you have  
7     other evidence besides this. I mean, he's attacking  
8     this, and saying if he wins here, you've got nothing  
9     else. But your argument is this was good evidence,  
10    it should have come in, and --

11            MS. ARMIJO: Correct.

12            THE COURT: -- and it wasn't -- and you've  
13    got other stuff, right?

14            MS. ARMIJO: Correct. I mean, I think  
15    that's it. I mean, I think they're very upset about  
16    the statement that came in. And I think it was never  
17    a secret that our whole theory, even from opening  
18    statement to well before, when they asked what our  
19    theory was, was about disrespect, and about the  
20    impact that it had, and all of that.

21            So I think that there was a great deal  
22    more. Certainly, there was a great deal about  
23    respect of the SNM at the trial. And I laid that out  
24    in our response. But also, as you may recall with  
25    Andrew Gallegos and his statement from -- to Billy

1 Cordova, it was about the bulldogging of the drugs,  
2 basically. And I laid that out. So we also have  
3 that they were -- the drug aspect of the murder as  
4 well, and that's referenced as well.

5 So we have two different theories, I think,  
6 that we ultimately went on, which was it was the  
7 bulldogging and the disrespect as far as a motive  
8 being strong for SNM. In addition to, there was  
9 significant evidence as to the Gallegos brothers and  
10 SNM, apart from these people, you know, with Andrew  
11 Gallegos -- speaking off the top of my head, I know  
12 Ms. Baldizan came in and testified. We had jail  
13 calls. We had letters. We had several people come  
14 in and talk about their ties to the SNM.

15 So you can't just take one statement out  
16 and say that there is no tie, and that we just didn't  
17 make that nexus, when, in fact, there was a great  
18 deal of testimony about a member being disrespected  
19 from the SNM. And we connected the ties as to Joe  
20 and Andrew both and the SNM, and showed it.

21 And I can still remember Mr. Benjamin going  
22 up to jurors after the verdict in this case and just  
23 telling them: I can't believe you found my client  
24 guilty. What was your nexus?

25 And the foreman even was telling him: What

1 do you mean? There was plenty of evidence. So  
2 clearly the jury had no problems with this. And we  
3 know that it was a very -- the jury in this case  
4 acquitted him on other counts. So it wasn't like  
5 there is just a broad sweeping, yeah, Gallegos is  
6 charged with two murders and other things, let's just  
7 find him guilty of everything, because they acquitted  
8 him on other contact, which we had telephone calls  
9 on, too.

10 So I think the verdict should stand in this  
11 case. There was plenty of evidence in this case.  
12 And the Court made the correct ruling at the time on  
13 these statements coming in. And we don't disagree  
14 with the Court. We're not going to disagree with the  
15 Court on appeal.

16 THE COURT: All right. Anything else,  
17 Ms. Armijo?

18 MS. ARMIJO: No, Your Honor. Thank you.

19 THE COURT: Any other defendant before Mr.  
20 Benjamin argues?

21 All right. Mr. Benjamin, do you have  
22 rebuttal?

23 MR. BENJAMIN: And, Your Honor, the phrase  
24 I'm going to have to agree to disagree with the  
25 Government, I think comes to mind here, because I

1 think she made some better points than I could hope  
2 to. Because she talks about a great deal of  
3 evidence, but she has done a very good job of not  
4 pointing any of that out. Because the theory that  
5 anything Joe does bad is related to the SNM, I think,  
6 is overarchingly broad and doesn't work.

7 But she listed off several words that I  
8 think are very important. The statement about --  
9 that Adrian Burns made was offered for impact, was  
10 offered for motive. Neither one of those gets them  
11 there. The statement about bulldogging for drugs, I  
12 don't understand how a pure and simple theft becomes  
13 an SNM crime. That's not -- they didn't charge  
14 bulldogging or that. They charged increasing or  
15 enhancing -- I'm screwing up the words -- but the  
16 indictment language is very specific in relation to  
17 the enterprise.

18 So with the absence of any enterprise  
19 evidence, what we're left with is the adage that I  
20 remember the first day of criminal law in law school:  
21 "If there is a body, somebody is going to jail."

22 Mr. Gallegos was acquitted on Counts 14 --  
23 I apologize, it was 13 through 16 -- and that was  
24 where a live witness testified. But there was not a  
25 burned body that they flashed up there multiple times

1 saying: This is bad; this is bad; this is bad. And  
2 Ms. Armijo's recitation of what I remember happening  
3 in the jury room is what they said. They said that  
4 there was just -- there was a body, is kind of what I  
5 remember getting out of that.

6 And so I asked; I haven't received. In May  
7 of 2017, I asked again; I haven't received. So, as I  
8 said, I think we respectfully just need to disagree  
9 that there is any evidence that connects them to the  
10 nexus.

11 So I appreciate that, Your Honor.

12 THE COURT: All right. Thank you, Mr.  
13 Benjamin.

14 Well, I still think I've got the  
15 evidentiary call correct there. I don't think it's a  
16 hearsay statement. I think it is commands. And so I  
17 don't think there is hearsay in there. So I think  
18 that came in. But I know, when I wrote the pretrial  
19 opinion on this, I was concerned, given what I was  
20 hearing from the Government, about the nexus issue.  
21 That's one reason I wrote the opinion. I wanted to  
22 draw a line so that the Government knew what they had  
23 to cross. I wanted you to know that I was taking  
24 seriously the nexus argument. And I also wanted to  
25 hold my feet to the fire. If they didn't cross that

1 line, I wanted to tell myself, Okay, I've already  
2 promised you I'm going to dismiss it.

3 I thought there was other evidence that  
4 came in through the trial. And I was listening  
5 carefully to it because of the Gallegoses'  
6 connections with SNM. And so I listened to that. I  
7 thought there was some more and sufficient evidence  
8 for it to go to the jury.

9 And so I'm inclined -- I'll relook at it.  
10 I'll bottom out on the evidentiary issue, if I didn't  
11 at trial. But I'm inclined to think I got that  
12 right. And I'm inclined to think that, as the trial  
13 developed, there was more evidence than what I knew  
14 about pretrial. And I thought they got it across the  
15 line.

16 MR. BENJAMIN: Thank you, Your Honor.

17 Respectfully, may I ask one more question,  
18 Your Honor?

19 THE COURT: Certainly.

20 MR. BENJAMIN: And the Court has done a  
21 very good job of articulating a lot of different  
22 things at different times. Would the Court -- and  
23 this is just a request from counsel, Your Honor --  
24 would the Court consider telling us what or how they  
25 got across the line? And I'm not asking the Court on

1 the spot now. I'm saying later in this motion -- or  
2 in its order.

3 THE COURT: I'll try. It may be that I'm  
4 going to need a little help from the Government to  
5 refresh my memory as to the circumstances that were  
6 there. But there was some evidence -- I think  
7 Mr. Castellano brought it out with some witnesses --  
8 that I had not heard pretrial. And so I may need a  
9 little assistance from the Government to refresh my  
10 memory as to what evidence they had that they did not  
11 show, or maybe even didn't have pretrial, that I was  
12 wrestling with when I did that memo. But I'll try to  
13 do that. I'll do it the best I can from a review of  
14 the transcript.

15 MR. BENJAMIN: Thank you, Your Honor.

16 THE COURT: All right. So I guess we've  
17 got one more motion left. And this is also, I think  
18 yours, Mr. Benjamin, if I'm not mistaken. This is  
19 the Rule 29 motion. Or have we taken care of that?

20 MS. ARMIJO: I think he did that earlier,  
21 Your Honor.

22 MR. BENJAMIN: That was --

23 THE COURT: That was the one we argued  
24 with --

25 MR. BENJAMIN: I don't want to bore the

1 Court for another 15 minutes. I'm done, Your Honor.

2 THE COURT: That's the one we argued with  
3 Mr. Burke, right?

4 MR. BENJAMIN: Yes, Your Honor. Unless  
5 Ms. Armijo wants me to go again.

6 MS. ARMIJO: Okay.

7 THE COURT: Well, are we done? We don't  
8 have -- I know I need some exhibits from Mr. Lowry.

9 MR. LOWRY: Yes, Your Honor.

10 MS. ARMIJO: And I just wanted to put on  
11 the record, Your Honor, that I know there was an  
12 issue on the very first motion with Mr. Castle about  
13 when we disclosed an item. And I told him yesterday  
14 that we had disclosed it February 6th of 2018. So  
15 just to put that on the record, that was kind of  
16 hanging out there. He wanted to put something in  
17 writing saying he had not ever received it before.  
18 And we actually had supplied it and gave him the date  
19 that we supplied it.

20 MR. COOPER: And that document --

21 MR. CASTLE: Judge, can I be heard on that?

22 THE CLERK: Mr. Castle is on the phone,  
23 Judge.

24 THE COURT: Let's get Mr. Castle, because  
25 it's just hard for people on the phone to break in.



1 Mr. Castle.

2 MR. CASTLE: Yes, Your Honor. The  
3 testimony was that Agent Acee, after the first wave  
4 of the arrests in this case, in the year 2016,  
5 conducted a recorded interview of Leroy Lucero --  
6 part of it was recorded, part of it was not -- in  
7 which, among other things, Mr. Lucero talked about  
8 having -- not wanting to be charged in the RICO. I  
9 do not believe that we received anything from 2016,  
10 or 2017, for that matter. We had a gap between the  
11 year of 2012 and 2018.

12 The prosecution identified a document from  
13 February 6th of 2018, which said -- essentially a  
14 cover letter for discovery. And we have reviewed  
15 those tapes and those reports. Those are all  
16 concerning an interview that Mr. Lucero made, I  
17 believe, on January 17, 2018. It was in January of  
18 2018. So it did not contain a reference or  
19 information concerning any 2016 interview with Mr.  
20 Lucero.

21 And so we argued -- I will send  
22 documentation in to the Court concerning that, and a  
23 request that that be ordered to be produced as a --  
24 under the Jencks Act.

25 So I think that Ms. Armijo is mistaken -- I

1 know she's mistaken -- that that letter in February  
2 identified anything -- any statement that Mr. Lucero  
3 made in 2016.

4 THE COURT: All right.

5 MS. ARMIJO: I don't think that there is  
6 going to be anything else to produce. If there is an  
7 issue as to any other statements, it's just that we  
8 had the wrong date. My understanding is what was  
9 produced is all that we have. There isn't another  
10 outstanding statement out there. But certainly, I  
11 can work with Mr. Castle to make sure he has  
12 everything. But I don't think there is anything left  
13 to be disclosed. And I will work with him.

14 THE COURT: All right.

15 MR. CASTLE: Judge, just to put on the  
16 record, I believe there is. And the reason is that,  
17 in 2016, Mr. Lucero was arrested on a probation  
18 violation for matters which often are considered  
19 technical: Urinalysis. That was one of the tactics  
20 the FBI used in their matters in which to try to get  
21 cooperation of individuals who were SNM members. Mr.  
22 Lucero, it turns out -- we reviewed the transcripts  
23 last night -- in 2017 -- in which it was indicated  
24 that Agent Acee, in 2017, before Your Honor at  
25 sentencing, was ready and able to take the stand and

1     testify that Mr. Lucero's life was in danger because  
2     of his cooperation.

3             So it's pretty clear there was some  
4     communications and statements made in 2016, and  
5     perhaps continuing in 2017. So those are the 302s  
6     that we need to have produced. And certainly there  
7     was at least information during that, in which Mr.  
8     Lucero indicated he was afraid of being charged in  
9     the RICO after the first wave of indictments.

10            The Court is aware that the indictments  
11     before this Court right now was from December of  
12     2015, which was considerably before the 2018  
13     statements that we were provided.

14            And so I believe they do need to redouble  
15     their efforts, because it was testified very clearly  
16     yesterday that it was a recorded interview, or part  
17     of it was recorded, and that it was done after the  
18     first wave of indictments.

19            So I will go ahead and file a written  
20     motion to that effect, but there was no hesitation in  
21     the testimony yesterday to the temporal portion of  
22     when that interview was conducted.

23            THE COURT: Anything else on that,  
24     Ms. Armijo?

25            MS. ARMIJO: No, Your Honor.

1 THE COURT: Anybody else have anything on  
2 that?

3 All right. Mr. Lowry, you have some  
4 documents to give me?

5 MR. LOWRY: Well, your Honor, the Court is  
6 in possession of them. I just wanted to clear up the  
7 record. In going through the exhibit list with  
8 Ms. Bevel earlier this morning, I just -- when we're  
9 doing our housekeeping at the beginning of this  
10 motion, I neglected to move in evidence the exhibits  
11 that were attached to the reply brief. And I've  
12 consulted with Ms. Armijo, and I don't think there is  
13 any opposition to that.

14 THE COURT: Can you put those on the  
15 record, or --

16 MR. LOWRY: Yes, Your Honor, I can.  
17 Defendant's Exhibit O would have been the Prisoner  
18 Location History for Anthony Ray Baca.

19 THE COURT: All right. Any objection,  
20 Ms. Armijo?

21 MS. ARMIJO: No, Your Honor.

22 THE COURT: Any other defendant?

23 All right. Not hearing or seeing any,  
24 Baca's Exhibit O will be admitted for purposes of his  
25 Document 2421.

1 (Defendant Baca Exhibit O admitted.)

2 MR. LOWRY: Exhibit P is a partial  
3 transcript of the Lupe Urquizo testimony that was  
4 quoted and cited in the reply brief.

5 THE COURT: Any objection, Ms. Armijo?

6 MS. ARMIJO: No, Your Honor.

7 THE COURT: How about from any other  
8 defendant?

9 Not hearing or seeing any, Baca Exhibit P  
10 will be admitted into evidence for purposes of his  
11 new trial motion 2421.

12 (Defendant Baca Exhibit P admitted.)

13 MR. LOWRY: Your Honor, I'd move in Q, R,  
14 and S. These are three audio files of telephone  
15 jailhouse recordings between Lupe Urquizo and various  
16 friends and family members regarding his viewing of  
17 the tablets.

18 THE COURT: All right. Any objection to  
19 those, Ms. Armijo?

20 MS. ARMIJO: Are they full transcripts or  
21 audios?

22 MR. LOWRY: They are full audio, the  
23 jailhouse recordings.

24 MS. ARMIJO: I thought you said  
25 transcripts. No objection.

1 THE COURT: All right. Anybody else have  
2 any objection?

3 Not seeing or hearing any, Baca's Exhibits  
4 Q, R, and S will be admitted for purposes of his new  
5 trial motion, 2421.

6 (Defendant Baca Exhibits Q, R, S admitted.)

7 MR. LOWRY: And, Your Honor, the final one  
8 would be Baca Exhibit T.

9 THE COURT: Any objection, Ms. Armijo?

10 MS. ARMIJO: No, Your Honor.

11 THE COURT: All right. Not hearing or  
12 seeing any, Baca Exhibit T will be admitted for his  
13 new trial motion.

14 (Defendant Baca Exhibit T admitted.)

15 MR. LOWRY: And, Your Honor, you should  
16 have a complete set of Defense Exhibits A through FF,  
17 with the exception of Exhibit W, which was a  
18 duplicate of Exhibit I, which we struck. So we  
19 skipped Exhibit W, Your Honor.

20 THE COURT: All right. So I have -- I  
21 think I have all those.

22 All right. Anybody else have anything?  
23 Mr. Davidson?

24 MR. DAVIDSON: Just for the record, Your  
25 Honor, if I may, Defendant Arturo Garcia joins Mr.

1 Herrera's motion for a new trial, Document 2413, and  
2 Mr. Troup's motion for new trial, Document 2420. I  
3 don't believe we previously indicated anything about  
4 that. If you'd like me to file a notice for the  
5 record, I could do that.

6 THE COURT: Well, I'm not requiring it, but  
7 if it is convenient, it will help me; I know I'll  
8 catch it and put that into the opinion. But I don't  
9 want to make you do a bunch of work. And probably  
10 I'll pick it up by reviewing this transcript. But it  
11 does help.

12 Anybody else have anything else we need to  
13 cover with these motions?

14 Well, let me say this: As I read the  
15 motions, I wasn't seeing that I was probably going to  
16 grant any new trials or grant any acquittals as I  
17 went through them. I'm not convinced, leaving here  
18 today, that I'm going to do that. I will work and  
19 give you opinions, and work through it. There is  
20 some stuff that's new here that I haven't thought  
21 much more than in preparation for the hearing, and  
22 being at the hearing. But I'm not seeing anything  
23 that gives me a sense that fundamentally new trials  
24 or convictions need to be set aside. So I think we  
25 need to take that into account, that I'm leaving here

1 not thinking I'm going to grant any of the motions.

2 In some of the -- I don't want to give away  
3 too much here, but in some of the CJA letters and  
4 stuff I received, I think I am holding the show up,  
5 because people are not being sentenced, as far as  
6 cooperators, because of the Government waiting to see  
7 what I'm going to do with new trial motions; maybe  
8 the same way for the men that have been convicted in  
9 the two DeLeon trials. I'm not telling y'all what to  
10 do, but I'm saying this because it makes sense to me  
11 that maybe we go ahead and start moving forward on  
12 those things.

13 I know I have been out-of-pocket. I don't  
14 know if everybody in this room knows I've -- when I  
15 got done with Mr. Cordova's trial in July, I went  
16 into a 21-day trial. And that actually, if you think  
17 about it, that's about a five-week trial. It drifted  
18 over. Plus, I've done two jury trials since then.  
19 So the last two weeks I've just completed two trials,  
20 so I had two going on at the same time. So I know  
21 that part of the problem has been my scheduling. I  
22 just simply haven't had days to devote to it. But  
23 that should clear up a little bit. A trial that I  
24 had in January for two weeks, the defendant pled. So  
25 I'm probably going to start filling it.



1           But I think we can move forward with  
2     sentencings. If I change my mind -- if I think that  
3     I'm going to be doing something -- and I don't plan  
4     to stop working on this; I plan to continue to plow  
5     ahead, because I think I'm not giving everybody  
6     comfort in proceeding to sentencing. And so I'm  
7     going to continue to work on opinions, and try to  
8     crank those out so that you can get assured that I'm  
9     not changing my mind, and I'm going to proceed to  
10    sentencing. Perhaps that will give everybody some  
11    comfort to go ahead and set those sentencings up and  
12    get them done. And I will continue to try to work to  
13    get the opinions out, to give you even more comfort  
14    as we go along.

15           There was something else related to that I  
16    wanted to say. But in any case, if I run into a bump  
17    in the road, I'll alert you, so that if people need  
18    to adjust on the sentencings, they can.

19           One reason I also encourage you to go ahead  
20    and let's set the sentencings, let's move them  
21    forward, is because it will keep my feet to the fire.  
22    If we start moving those sentences, or we don't set  
23    them, other things come up, and I start, you know,  
24    sort of dealing with the most immediate thing, the  
25    thing that's right in my face that I have to deal

1 with. And if you're right in my face, and you're the  
2 next thing, chances are I'm going to get your  
3 opinions and rulings out before I see you again.

4 All right. Let me again express my  
5 appreciation to everybody. It's probably the last  
6 time we're all going to get together in this case.  
7 And let me express my appreciation for everybody's  
8 hard work and good nature, and you were a good bunch  
9 to work with. You'll certainly always be something  
10 I'll remember, and I appreciate everybody's courtesy  
11 and respect for the Court and everything you did. So  
12 I appreciate everything everybody did for the Court.

13 Is there anything else we need to discuss  
14 while we're together? Anything else I can do for  
15 you? Ms. Armijo? Mr. Castellano?

16 MS. ARMIJO: Your Honor, just along those  
17 lines, I know that you want to move forward with the  
18 sentencings. I think we still have a couple of  
19 briefs out there. Are we going to put, like a time  
20 limit when we get the initial one, so that then we're  
21 not just kind of waiting to see if one is going to be  
22 filed or not?

23 THE COURT: I know we're looking for one  
24 from Ms. Torraco.

25 MS. ARMIJO: Torraco, and Mr. Lowry, and

1 Mr. --

2 THE COURT: When do you think you may have  
3 that ready, Ms. Torraco?

4 MS. TORRACO: I think that depends on  
5 Christmas. Will you give me some grace for Christmas  
6 and let it be due in January?

7 THE COURT: Why don't you propose a  
8 deadline for yourself?

9 MS. TORRACO: January 15.

10 THE COURT: Does that work for you?  
11 January 15?

12 MS. ARMIJO: Yes, that's fine.

13 THE COURT: All right. Who else was going  
14 to -- Mr. Lowry.

15 MR. LOWRY: I was considering January 4,  
16 Your Honor.

17 THE COURT: All right.

18 MR. LOWRY: I was sensitive to Ms. Armijo's  
19 trial coming up.

20 MS. ARMIJO: I think have a trial the 8th,  
21 so I'll probably need maybe a little bit additional  
22 time. But that's fine.

23 THE COURT: All right. Was there somebody  
24 else that was going to submit anything additionally?

25 MR. COOPER: Probably Mr. Castle.

1 THE COURT: Mr. Castle. What do you want  
2 to propose as your deadline, Mr. Castle?

3 MR. CASTLE: Hold on. There, I got off  
4 mute, I think.

5 I was hoping to look at the transcript, and  
6 make sure I have all of what Agent Acee said down  
7 correctly. I don't know if we could just get his  
8 transcript somehow expedited. And I wouldn't need  
9 much time after I received that to be able to file my  
10 motion.

11 THE COURT: All right. Do you want to  
12 propose a date? If we have to move it, we can. But  
13 do you want to propose a hard deadline?

14 MR. CASTLE: Could we inquire of Ms. Bean  
15 what she thinks it might take?

16 THE REPORTER: I think it's already been  
17 ordered expedited, right?

18 THE COURT: Okay. So she's thinking she  
19 can get it to you in seven days.

20 MR. CASTLE: Then can I have till the  
21 1st -- well, January 2nd, Your Honor?

22 THE COURT: Does that work for you,  
23 Ms. Armijo?

24 MS. ARMIJO: Yes, Your Honor.

25 THE COURT: All right. So January 2.

1 Anybody else you want deadlines for,  
2 Ms. Armijo?

3 MS. ARMIJO: No, Your Honor, that's it. I  
4 just wanted to make sure. If people need additional  
5 time during the holidays, that's fine, I just wanted  
6 to make sure that we weren't in March still waiting  
7 for something.

8 THE COURT: All right. Anything else that  
9 we need to discuss? Anything else I can do for you,  
10 Ms. Armijo?

11 MS. ARMIJO: No, Your Honor. Thank you.

12 THE COURT: How about for the defendants?  
13 Anyone else? Anything else we need to discuss?  
14 Anything else I can do for you? Mr. Castle?  
15 Mr. Cooper? Anybody?

16 MR. COOPER: No, Your Honor. And thank  
17 you --

18 MR. CASTLE: No, Your Honor.

19 MR. COOPER: And thank you for all that  
20 you've done in these trials. And we appreciate  
21 everything you've done as well.

22 THE COURT: All right. I appreciate it. I  
23 appreciate your hard work. I'll probably see the  
24 Government fairly frequently; see you gentlemen here  
25 when we get your sentencings set up.

1                   Everybody have good holidays. Be safe.  
2           Thank you for being here this week. I appreciate  
3           everybody kind of pushing everything and getting it  
4           done.

5                   All right. Y'all have a good one. Good to  
6           see you.

7                   (The Court was adjourned.)  
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
## C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,  
Official Court Reporter for the State of New Mexico,  
do hereby certify that the foregoing pages constitute  
a true transcript of proceedings had before the said  
Court, held in the District of New Mexico, in the  
matter therein stated.

In testimony whereof, I have hereunto set my  
hand on December 22, 2018.

  
\_\_\_\_\_  
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